

## The Constitutional Canon As Argumentative Metonymy

### Abstract

This article builds on Philip Bobbitt's Wittgensteinian insights into constitutional argument and law. I examine the way that we interact with canonical texts as we construct arguments in the forms that Bobbitt has described. I contend that these texts serve as metonyms for larger sets of associated principles and values, and that their invocation usually is not meant to point to the literal meaning of the text itself. This conception helps explain how a canonical text's meaning in constitutional argument can evolve over time, and hopefully offers the creative practitioner some insight into the kinds of arguments that might accomplish this change.

I offer three examples, each organized by: (1) the argumentative modality within which the text most often appears; (2) the type of evolution the text's meaning has undergone; and (3) the predominant sphere of constitutional discourse in which the evolution has taken place. The first example—Thomas Jefferson's Reply to the Danbury Baptists—appears in the historical modality, and is an example of "decanonization" accomplished in the Supreme Court. The second, *Lochner v. New York*, appears in doctrinal argument and exemplifies "canonical refinement" within the legal academy. The Declaration of Independence and the Gettysburg Address are my final examples; they appear in the ethical modality, and illustrate "canonical reformation" within the sphere of constitutional politics. Along the way, I hope that my historical narratives shed perhaps a little light on old and familiar stories.

I do not intend to forward much of a normative interpretive theory here, beyond pointing to Wittgenstein's generalized assertion that meaning can best be found in use. Indeed, I believe this approach is in keeping with the central and illuminating Wittgensteinian insight that Bobbitt has brought to constitutional law. That is, there are no "right" answers to many constitutional questions; there are no foundational kinds of definitions for the most controverted constitutional terms, which we might discover if only we could hit upon the correct interpretive theory or algorithm. All that we have is the constitutional conversation itself—this discussion and its derivative decisions are, in fact, the constitution—and the only meanings we can attach to disputed terms are those that we can discover by looking to their proper use. It is nonetheless true that such a descriptive project is also, by necessity, a historical project, complete with its own kinds of interpretive decisions and normative judgments. But my aim here is at a particular kind of history—an "argumentative" history, for lack of a better phrase—which explores the appearance and construction of canonical texts within particular arguments, and tries generally to avoid taking a position on the merits of substantive claims. In the end, I conclude that constitutional argument—like art—is better described than explained.

# The Constitutional Canon As Argumentative Metonymy

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*It might be imagined that some propositions, of the form of empirical propositions, were hardened and functioned as channels for such empirical propositions as were not hardened but fluid; and that this relation altered with time, in that fluid propositions became hardened, and hard ones became fluid.*

Ludwig Wittgenstein<sup>1</sup>

In recent years, the constitutional canon has been a subject of growing interest and controversy among theorists as notable and diverse as Bruce Ackerman, Jack Balkin, Sanford Levinson, Philip Bobbitt, William Rich, Richard Primus, and Suzanna Sherry.<sup>2</sup> The thought, crudely put, is that there are certain texts apart from the Constitution—some are directly derivative, others are not—which resound so powerfully in our constitutional ear that they have hardened, in incompletely defined ways, into part of the fundamental law itself.<sup>3</sup> This idea, in all of its permutations, is profoundly important for constitutional lawyers, particularly as our constitutional culture continues to quake, erupt, and reform along unforeseen and unforeseeable technological and communicative fault lines. After all, it is largely through the ongoing construction and reconstruction of the canon—the reconfiguration of Wittgenstein’s “fluid” and “hardened” propositions—that we accomplish modern constitutional reform; or something akin to the five-staged “constitutional moments” that Ackerman has so insightfully identified.<sup>4</sup> And, as our discourse evolves to incorporate terms like “superprecedent”<sup>5</sup> and

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<sup>1</sup> LUDWIG WITTGENSTEIN, ON CERTAINTY 15, #96 (Denis Paul & G.E.M. Anscombe, trans., Harper 1972).

<sup>2</sup> See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1750 (2007); Jack Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 999 (1998); Philip Bobbitt, *The Constitutional Canon*, in LEGAL CANONS 331 (Jack Balkin & Sanford Levinson, eds. 2000); William Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 199 (2002); Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L. J. 243 (1998); Suzanna Sherry, *The Canon in Constitutional Law*, in LEGAL CANONS 374 (Jack Balkin & Sanford Levinson, eds. 2000).

<sup>3</sup> Balkin & Levinson, *supra* note 2, at

<sup>4</sup> BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 20 (1998).

<sup>5</sup> See Jeffrey Rosen, *So, Do You Believe in “Superprecedent”?*, N.Y. TIMES [section] 4, at 1 (Oct. 30, 2005).

“landmark statute,”<sup>6</sup> it is critical that we continue to work towards a coherent theory of the canon and its function in constitutional practice.

My admiration for Philip Bobbitt’s modal theory of the Constitution—which posits six legitimate “modalities” of constitutional argument<sup>7</sup>—is on record, and so it is perhaps unsurprising that I am drawn to his attempt at a modal catalogue of canonical texts.<sup>8</sup> And although I conceive of this project as in keeping with Bobbitt’s original Wittgensteinian insight,<sup>9</sup> my approach to the relationship between the constitutional canon and the constitutional modalities is different than that which he has taken. While Bobbitt identifies particular canonical texts as exemplars of the different modalities of argument,<sup>10</sup> my purpose here is to explore the ways that we *use* these texts to help make modal arguments and decisions within the practice of constitutional law. I thus take Bobbitt’s opening insight— “[t]exts may speak, but they do not decide”<sup>11</sup>—as the starting point of an account that sees many canonical texts employed as metonyms for larger constitutional principles or concepts. I borrow an idea from language theory, as does Bobbitt’s modal account, because law, like language, is a *practice*; an interactive communicative enterprise that legitimizes particular acts or utterances based on their usage and acceptance within a specific community and context.<sup>12</sup> It is, in other words, impossible to say what *McCulloch v. Maryland* (for example) “means” in absolute terms; rather, to understand that text’s constitutional significance we must look to how it is *used* in the constitutional conversation. To this end, I hope that the

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<sup>6</sup> See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 125 (2008) (discussing the “shift from formal amendment to landmark statute” in the context of the civil rights struggle).

<sup>7</sup> See, e.g., Ian Bartrum, *Metaphors and Modalities: Meditations of Bobbitt’s Theory of the Constitution*, 17 WM. & MARY BILL OF RTS. J. 157 (2008). Bobbitt has theorized that it is the *form* or *modality* of a constitutional argument that determines its legitimacy. He identifies six legitimate argumentative modalities: historical, textual, doctrinal, structural, prudential, and ethical. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (Basil Blackwell, 1991).

<sup>8</sup> Bobbitt, *supra* note 2, at 332-56.

<sup>9</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 5, 123 (Oxford Univ. Press, 1982). Bobbitt’s insight is Wittgensteinian in that he argues that constitutional meanings are embedded (and only comprehensible) within the *practice* of constitutional argument. It is, in other words, impossible to say what a constitutional provision means in the abstract; rather, we can only usefully identify meanings in context as we apply the modalities of argument to make concrete constitutional decisions.

<sup>10</sup> See Bobbitt, *supra* note 2, at 332.

<sup>11</sup> *Id.* at 331.

<sup>12</sup> For a theoretical account of language in these terms, see generally, LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe, trans., 3d ed., 1958) (positing a theory of reference based partly on correct usage within particular language-games).

concept of constitutional metonyms can help illuminate the ways that we both use and recreate the canon as we build constitutional arguments and make constitutional decisions.

Accordingly, this paper does not attempt to justify a list of the most canonical texts in constitutional law, nor do I argue that we should treat certain cases or statutes as constitutional amendments accomplished outside of the Article V process. Rather, I explore the ways that we use canonical texts when we make the kinds of constitutional arguments that Bobbitt has identified. I have thus tried to choose texts that most lawyers would agree are either canonical or “anti-canonical”<sup>13</sup>—I contend here that the canon and the anti-canon serve the same metonymic function in our practice—in the hope that a few specific illustrations might provide a sufficient model from which to extrapolate the theory I propose. That theory, succinctly put, is that a canonical text serves as a placeholder—a metonym—for a larger set of associated ideas or principles;<sup>14</sup> and, further, that this larger set of ideas is not always entirely consistent with the original meaning of the particular text. Thus, a canonical text takes on its own metonymic meanings—sometimes quite apart from its literal textual meaning—within the practice of constitutional law. Indeed, it is largely the power and utility that a text has as a metonym for larger values within our modal practice that determines whether, and how, we accept it as canonical. Canonical texts, which we might see as having “hardened” in the Wittgenstenian sense, make up the channels through which more “fluid” propositions of constitutional meaning then flow. But precisely because these texts function as *metonyms*—not as narrow or literal statements of law—their propositional content will change as the associated concepts they connote are realigned within constitutional culture and practice. It is thus ever a two-way street: the canon channels the practice, but, in turn, the practice reshapes the canon. And, of real significance for practitioners, a deeper understanding of these processes may provide more sophisticated tools with which to exercise long-term influence on constitutional meanings.

With this in mind, I have organized the examples below along three separate axes. First, I locate each illustration within a particular constitutional modality; that is, I identify the form of argument that canonized the particular text. Thus, the *Gettysburg Address*, which

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<sup>13</sup> See Balkin & Levinson, *supra* note 2, at 1018-19 (discussing the formation of an “anti-canon”); accord Primus, *supra* note 2, at \_\_\_\_.

<sup>14</sup> Professors Balkin and Levinson make—though do not much explore—a similar point in their discussion of the canon as “examples.” *Id.* at 992. They even go so far as to label some canonical arguments “synecdoches,” although I think the broader trope (metonym) is more precisely applicable. *Id.*

appears in the final section, makes up a part of the ethical canon: it is a product of Lincoln's ethical argument about constitutional meaning, and it is now among those texts a practitioner can use—or at least must account for—as she constructs constitutional arguments rooted in the ethos of American democracy. I do not mean to suggest that a canonical text can only appear in one modality of argument—indeed I have argued elsewhere that some of the most important moments of constitutional evolution result from the overlap of modal arguments<sup>15</sup>—but I do contend that each piece of the canon has a modal home, so to speak, where it is best and most comfortably employed. Second, I have tried to choose examples that illustrate three distinct categories of evolution in metonymic meaning. My first example demonstrates the process of *decanonization*, in which a text is washed out of the constitutional riverbed and carried away downstream; the second illustrates the process of *canonical refinement*, in which a text's metonymic meaning is distilled as it assimilates into a changing constitutional culture; and the third exemplifies the process of *canonical reformation*, in which a text assumes—or reassumes—vital and significant metonymic meanings.<sup>16</sup> Finally, I identify the predominant sphere of constitutional discourse within which the relevant changes in metonymic meaning have taken place: in my examples the respective spheres are the Court, the legal academy, and constitutional politics. By organizing the examples in this way, I hope to offer practitioners a descriptive model of canonical (thus constitutional) change accomplished within the existing modalities of argument, which may alert creative advocates to valuable new methods of craft.

Those looking for a normative kind of thesis in this piece will, I fear, be disappointed, as this is a decidedly descriptive project. Indeed, this approach is in keeping with the central and illuminating Wittgensteinian insight that Bobbitt has brought to constitutional law. That is, there are no “right” answers to many constitutional questions; there are no foundational kinds of definitions for the most controverted constitutional terms, which we might discover if

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<sup>15</sup> Bartrum, *Metaphors and Modalities*, *supra* note 7, at 168.

<sup>16</sup> It might be helpful here to think of the canon in terms of another, non-geological, analogy. Imagine canonical texts as argumentative boundary stakes, which roughly describe the path a competent practitioner must travel within a particular modality. Attached to these stakes are a number of metonymic meanings, which further define the contours and scope of acceptable argument. In *decanonization* the stake and all its meanings are simply uprooted and carried away, perhaps to appear again somewhere else. In *canonical refinement* one or more metonymic meanings are detached from the stake, which remains in place. And in *canonical reform* a significant new (or renewed) meaning is attached to the original stake, which dramatically alters the shape of the practice. It is certainly no accident that these processes roughly correspond to the familiar doctrinal practices of *repudiating*, *distinguishing*, and *extending* common law precedent.

only we could hit upon the correct interpretive theory or algorithm. All that we have is the constitutional conversation itself—this discussion and its derivative decisions are, in fact, the constitution—and the only meanings we can attach to disputed terms are those that we can discover by *looking to their proper use*.<sup>17</sup> That is my purpose here, to describe evolutions in the use—and thus the meaning—of canonical texts in constitutional argument, and to thus identify ways that we can influence and adapt constitutional meanings over time through particular uses of modal argument. It is nonetheless true that such a descriptive project is also, by necessity, a historical project, complete with its own kinds of interpretive decisions and normative judgments. But my aim here is at a particular kind of history—an *argumentative* history, for lack of a better phrase—which explores the appearance and construction of canonical texts within particular arguments, and tries generally to avoid taking a position on the merits of substantive claims. Along the way, I do also hope that I may tell old stories anew, and reinvigorate familiar historical narratives. As for normative constitutional theories, a priori definitions, and interpretive algorithms, however, I am content here to pass over them in silence. With that said, I hope the illustrations below can help to clarify the concept of canonical metonyms and their importance to the practice of constitutional law.

#### I. HISTORY: THE SUPREME COURT, THOMAS JEFFERSON’S WALL OF SEPARATION, AND DECANONIZATION

The Supreme Court incorporated the Establishment Clause against the states in the 1947 decision *Everson v. Board of Education of Ewing Township*, which upheld a New Jersey program that reimbursed parents for the costs of public transportation to both public and parochial schools.<sup>18</sup> At the rhetorical center of Justice Hugo Black’s majority opinion was a phrase taken from Thomas Jefferson’s reply letter to a group of dissenting Connecticut Baptists: “In the words of Jefferson, the clause against establishment of religion by law was

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<sup>17</sup> See WITTGENSTEIN, INVESTIGATIONS, *supra* note 12, at 20, (#42) (“The meaning of a word is its use in the language.”). Indeed, Wittgenstein might have agreed that, like philosophical problems, our deepest constitutional dilemmas arise when our constitutional grammar “goes on holiday”; when we try to assimilate the use of one kind of term to a discussion of a different kind, or when we try to understand a term in isolation from the contexts in which it is normally employed. See *id.* at 19, (#38).

<sup>18</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Some of the material and ideas in this section first appeared in, Ian Bartrum, *Of Historiography and Constitutional Principle: Jefferson’s Reply to the Danbury Baptists*, 51 J. OF CHURCH & STATE \_\_\_\_ (2009). They are used here with the permission of the Oxford University Press.

intended to erect ‘a wall of separation between church and state.’”<sup>19</sup> From this moment of constitutional canonization, the symbolic wall would feature prominently in many of the establishment decisions handed down over the next half century, but surprisingly little attention has been paid to the actual history or context of Jefferson’s letter.<sup>20</sup> While this circumstance is perfectly consistent with a metonymic understanding of the canon, it is important for my descriptive purposes here to begin with some contextual account of the letter’s original or literal meaning.

The story of the Danbury letter begins at least as far back as the bitterly contested presidential election of 1800, in which Jefferson defeated incumbent Federalist John Adams.<sup>21</sup> As part of a vigorous smear campaign, the Federalist press used Jefferson’s decades-old remarks about religious freedom in Virginia—including his infamous claim that the worship of “twenty gods or no god....neither picks my pocket nor breaks my leg”<sup>22</sup>—to brand him a Deist, or worse, an Atheist.<sup>23</sup> In the *Connecticut Courant*, the pseudonymous “Burleigh” gladly paraded the various horrors that Jefferson’s views might entail:

The doctrine is this—that if a man believes in the rectitude of murder, atheism, rape, adultery, etc., it is of no importance, because it neither breaks our legs or picks our pockets; and as long as our pockets and legs are safe, government is satisfied.<sup>24</sup>

Even after the campaign, Federalists continued to lament the election of the “howling atheist”<sup>25</sup> whose supposed predilection was “to eradicate every principle and efface every vestige of the Christian religion.”<sup>26</sup> And of particular concern in New England was Jefferson’s refusal (as President) to make official proclamations or prayers of thanksgiving on traditional days—indeed, the Massachusetts *Columbian Centinel* had earlier suggested that, in

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<sup>19</sup> *Id.* at 16.

<sup>20</sup> See Bartrum, *supra* note 15, at \_\_\_\_.

<sup>21</sup> For a provocative account of the vagaries of the 1800 contest, see Charles O. Lerche, Jr., *Jefferson and the Election of 1800: A Case Study in Political Smear*, 5 WM. & MARY Q. 467 (1948).

<sup>22</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 170 (J.W. Randolph, ed. 1853).

<sup>23</sup> See, e.g. “A Letter to A Friend,” CONNECTICUT COURANT (August 18, 1800); accord Thomas E. Buckley, *Reflections on A Wall*, 56 WM. & MARY Q. 795 (1999).

<sup>24</sup> Burleigh, “To the People of the United States,” CONNECTICUT COURANT (July 7, 1800), at 3.

<sup>25</sup> See RICHARD J. PURCELL, CONNECTICUT IN TRANSITION: 1775-1818 (Oxford Univ. Press, 1918) (quoting Connecticut clergyman Thomas Robbins’ diary entry, “I do not believe the Most High would permit a howling atheist to sit at the head of this nation”).

<sup>26</sup> Lucius, “Letter,” WASHINGTON FEDERALIST, (Feb. 10, 1801), at 2; accord Constance B. Schulz, “Of Bigotry in Politics and Religion”: Jefferson’s Religion, the Federalist Press, and the Syllabus, 91 VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 73, 82 (1983).

Virginia, a Governor “in his public addresses may openly ridicule the Christian Religion, or deny the excellence of God, without punishment or impeachment.”<sup>27</sup>

A year into his presidency, these “slanders and slanderers” still stung Jefferson, who vehemently denied that he meant to encourage a “government without religion,”<sup>28</sup> and he actively sought an opportunity to explain himself to his detractors in the North.<sup>29</sup> He got his chance when a committee of Baptist dissenters from Connecticut—who saw Jefferson as a potential ally in their struggle against the Congregationalist state establishment—sent the new President a letter of congratulations.<sup>30</sup> The Baptists’ letter, drafted in October of 1801, did not reach the White House until the last days of December,<sup>31</sup> but when it did finally arrive he undoubtedly welcomed the passage on religious freedom:

Our sentiments are uniformly on the side of Religious Liberty—That religion is at all times and places a Matter between God and Individuals—That no man ought to suffer in Name, person or effects on account of his religious Opinions—That the legitimate Power of civil Government extends no further than to punish the man who works ill to his neighbor. But Sir, our [Connecticut] constitution is not specific. Our ancient charter, together with the Laws made coincident therewith, were adopted as the Basis of our Government, at the time of the revolution; and such had been our Laws and usages, and such still are; that religion is considered as the first object of Legislation: and therefore what religious privileges we enjoy (as minor part of the state) we enjoy as favors granted, and not as inalienable rights: and these are inconsistent with the rights of freemen. It is not to be wondered at therefore; if those, who seek after power and gain under the pretense of government and Religion should reproach their fellow men—should reproach their chief Magistrate, as an enemy of religious Law and good order, because he will not; dares

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<sup>27</sup> Decius, “The Jeffersoniad No. IV,” COLUMBIAN CENTINEL (July 9, 1800) at 1 (emphasis omitted).

<sup>28</sup> Thomas Jefferson, Letter to DeWitt Clinton (May 24, 1807) in THOMAS JEFFERSON PAPERS, ser. 1, reel 38 (attributing the “lie” of “government without religion” to “slanderer” William Linn, a villain he thought best left to the “scourge of public opinion”). Jefferson also shared his lingering bitterness with friend Joseph Priestley: “What an effort, my dear Sir, of bigotry in politics and religion we have gone through!” Thomas Jefferson, Letter to Dr. Joseph Priestley (March 21, 1801) *reprinted in* JEFFERSON, WRITINGS *supra* note 22, at 1085. *See also* Thomas Jefferson, Letter to James Monroe (outline) (May 26, 1801) in THOMAS JEFFERSON PAPERS, ser. 3, reel 4 (reflecting on the “calumn[y]...of atheism” he had suffered).

<sup>29</sup> PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 159 (Harvard Univ. Press, 2002). Professor Hamburger presents a thorough and thoughtful overview of the entire Danbury Baptists episode. *Id.* at 155-81.

<sup>30</sup> Jefferson told his Secretary of State, Levi Lincoln of Massachusetts, that the Baptists’ letter “furnishes an occasion . . . which I have long wished to find, of saying why I do not proclaim fastings and thanksgivings, as my predecessors did.” Thomas Jefferson, Letter to Levi Lincoln (Jan. 1, 1802) in THOMAS JEFFERSON PAPERS, ser. 1, reel 25.

<sup>31</sup> James H. Hutson, Thomas Jefferson’s Letter to the Danbury Baptists: A Controversy Rejoined, 56 WM. & MARY Q. 775, 782 (1999).



not assume the prerogative of Jehovah and make Laws to govern the Kingdom of Christ.<sup>32</sup>

Jefferson quickly seized on the Baptists' letter as an opportunity to clarify his own position on official proclamations—though he recognized that this was not directly responsive to the Baptists' message<sup>33</sup>—and immediately crafted a reply to the Danbury Association. His original draft, in its entirety, reads as follows:

The affectionate sentiments of esteem and approbation which you are so good as to express towards me on behalf of the Danbury Baptist Association, give me the highest satisfaction, my duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies solely between man and his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state. Congress thus inhibited from acts respecting religion, and the Executive authorized only to execute their acts, I have refrained from prescribing even those occasional performances of devotion practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises, only to the voluntary regulations and disciplines of each respective sect. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced that he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common father and creator of man, and tender you for yourselves and the Danbury Baptist association assurances of my highest respect and esteem.<sup>34</sup>

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<sup>32</sup> “The Address of the Danbury Baptist Association, in the State of Connecticut; Assembled October the 7<sup>th</sup>, 1801, to Thomas Jefferson, Esq. President of the United States of America” (excerpt) (underline in original) in THOMAS JEFFERSON PAPERS, ser. 1, reel 24.

<sup>33</sup> See Thomas Jefferson to Levi Lincoln (Jan. 1, 1802) *supra* note 27 (conceding the “awkward” connection between official proclamations and the Baptist’s letter).

<sup>34</sup> Thomas Jefferson, Letter to Messrs. Nehemiah Dodge, Ephraim Robbins, and Steven S. Nelson, a Committee of the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802) in THOMAS JEFFERSON PAPERS, ser. 1, reel 24 (emphasis in original) [hereinafter “*Jefferson to the Baptists*”]. For a reproduction of the letter with Jefferson’s handwritten deletions revealed, see Hutson, *supra* note 28, at 779.

Here Jefferson was at pains to emphasize his particular limitations as executive of the *federal* government—which must leave the subject of religion exclusively to the state legislatures—and he even went so far as to link national proclamations of faith with the hated English monarchy.<sup>35</sup> But he also recognized that he was a Virginian, and that his words could have unintended consequences in the devout Northeast, so he decided to run the draft by his Secretary of State, Levi Lincoln of Massachusetts.<sup>36</sup>

Lincoln, who was familiar with New England religious and political life, suggested that Jefferson soften his language and innuendo regarding official proclamations, where, even among Republicans, “the custom is venerable being handed down from our ancestors.”<sup>37</sup> While he agreed that Jefferson should try to communicate his thoughts on disestablishment, he thought it “best to have it so guarded, as to be incapable of having it construed into an implied censure of the usages of any of the States.”<sup>38</sup> The President took Lincoln’s advice and omitted the middle sentence of the second paragraph, which specifically derided national proclamations as a vestige of the English establishment.<sup>39</sup> He noted in the margin of his handwritten draft that this sentence “was omitted on the suggestion that it might give uneasiness to some of our republican friends in the eastern states where the proclamation of thanksgivings etc. by their Executives is an ancient habit and is respected.”<sup>40</sup>

The letter as sent, then, did not explicitly address the subject of federal proclamations—which initially had been among its primary motivations—and, as a result, the final draft is open to an interpretation that is not readily apparent from the original formulation.<sup>41</sup> Where Jefferson’s first draft invoked the “wall of separation” between the federal government and religion as justification for his refusal to perform public devotions (a structural argument grounded in the distinct powers of state and federal governments), it is possible to read the final letter as a kind of free-standing statement on the potential parameters of a substantive federal disestablishment. While it seems unlikely that Jefferson intended to

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<sup>35</sup> *Jefferson to the Baptists*, *supra* note 31.

<sup>36</sup> Thomas Jefferson to Levi Lincoln (Jan. 1, 1802) *supra* note 27.

<sup>37</sup> Levi Lincoln, Letter to Thomas Jefferson (Jan. 1, 1802) in THOMAS JEFFERSON PAPERS, ser. 1, reel 24.

<sup>38</sup> *Id.*

<sup>39</sup> *Jefferson to the Baptists*, *supra* note 31.

<sup>40</sup> *Id.*

<sup>41</sup> Perhaps as a result, the final letter did not get the publicity Jefferson had hoped for: the Baptists chose neither to publish it nor to employ the new language of separation in their subsequent efforts to undermine the Connecticut establishment. HAMBURGER, *supra* note 26, at 163.

make such a statement—he understood the founding view of the Establishment Clause as a federalism provision,<sup>42</sup> and he had willingly proclaimed days of thanksgiving when governor of Virginia<sup>43</sup>—his final language lent itself easily to this purpose after the Civil War, when substantive questions about federal disestablishment became more salient. The natural place for such questions to arise was in the federal territories, where the national government (through territorial legislatures) exercised plenary power and in effect stood in the shoes of state governments elsewhere.<sup>44</sup> And thus it was in a case from the Utah territory that the Supreme Court first turned its attention to Jefferson and began to construct the Danbury letter’s metonymic meaning.

That case, decided in 1878, was *Reynolds v. United States*, in which a Mormon challenged his federal polygamy conviction on Free Exercise grounds.<sup>45</sup> The Court struggled to find a precise constitutional definition of either “religion” or “religious freedom”—which is hardly surprising given that the document left the subject entirely to the states—and Chief Justice Morrison Waite thus decided to look beyond the text “to the history of the times in the midst of which the [First Amendment] was adopted.”<sup>46</sup> In his effort to understand what substantive federal religious liberty might look like, Waite turned to materials written during Virginia’s struggle to disestablish the Anglican church: Jefferson’s *Virginia Statute Establishing Religious Freedom* and James Madison’s *Memorial and Remonstrance Against Religious Assessments*.<sup>47</sup> Then, in hopes of bridging the gap between the state and federal

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<sup>42</sup> See LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 74 (Macmillan, 1986) (the clause provided “that religion as a subject of legislation was reserved exclusively to the states”). That Jefferson accepted this conception is evidenced by his deliberate mark of emphasis on “their legislature” in the handwritten draft of the letter. *Jefferson to the Baptists*, *supra* note 32.

<sup>43</sup> Thomas Jefferson, “Proclamation Appointing a Day of Thanksgiving and Prayer” (Nov. 11, 1779) *reprinted in* 3 *THE PAPERS OF THOMAS JEFFERSON* 177 (Julian P. Boyd ed., 1951) (notably delivered two years *after* he drafted the substance of the “Virginia Statute of Religious Freedom”).

<sup>44</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 247-52 (Yale Univ. Press, 1991). Indeed, Professor Amar points out that, through the Northwest Ordinance (enacted on the same day that debates over an early version of the Establishment Clause took place), the First Congress actively supported religion in the territories; which strongly suggests that the early Clause had only structural, and not substantive, import. *Id.* at 247. Over time, however, as territorial legislatures struggled to implement the First Amendment on the ground, “the agnostic federalism reading—hard enough for some to see when the establishment clause addressed ‘Congress’—faded from view [and was] replaced by a substantive anti-establishment interpretation.” *Id.* at 249.

<sup>45</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>46</sup> *Id.* at 162.

<sup>47</sup> THOMAS JEFFERSON, *THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM* (1786), *reprinted in* *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM* xvii-xviii (Merrill D. Peterson & Robert C. Vaughan eds., 1988); JAMES

spheres, Waite quoted the entire central paragraph of the Danbury letter, whose pedigree made it he thought “an authoritative declaration of the scope and effect of the [First Amendment].”<sup>48</sup> In so doing he began to lay the foundation for the letter’s metonymic meaning in constitutional practice: rather than focus on Jefferson’s literal intention to trace the boundaries of federal power, Waite immortalized an interpretation which treats the letter as a definitive statement on the *substance* of religious freedom. Given that *Reynolds* was a Free Exercise case, however, it was not the “wall of separation” but Jefferson’s distinction between “actions” and “opinions” that interested Waite, who concluded that the Constitution did not preclude statutory prohibition of “acts” of polygamy.<sup>49</sup>

Substantive federal disestablishment continued to evolve in the territorial context, however, and the Danbury letter made its first appearance in an Establishment Clause decision when the Court of Appeals upheld the federal incorporation of a Catholic hospital in the District of Columbia.<sup>50</sup> The appeals court again reproduced the letter’s central paragraph and quoted Chief Justice Waite’s opinion of its import, but went on to offer an opinion on the nature and scope of the disestablishment reflected in Jefferson’s wall metaphor: “[T]he declaration was intended to secure ... complete religious liberty to all persons, and the absolute separation of the Church from the State, *by the prohibition of any preference*, by law, in favor of any one religious persuasion or mode of worship.”<sup>51</sup> This interpretation—which has sometimes been labeled a “nonpreferentialist” or “accommodationist” reading<sup>52</sup>—corresponds to what I have called an “inclusive” theory of state neutrality, which views the state as religiously neutral when it *includes* all religious viewpoints equally.<sup>53</sup> *Roberts v. Bradfield* made its way up to the Supreme Court, which upheld the disposition below but chose not to invoke the Danbury letter in support of its opinion.<sup>54</sup> The Court’s decision not to

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MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 6-7 (1785) (Marvin Meyer ed., 1981).

<sup>48</sup> *Reynolds*, 98 U.S. at 164.

<sup>49</sup> *Id.* at 167. It is perhaps ironic that, had Waite treated *Reynolds* as an establishment case, the interpretation of Jefferson’s “substantive” position might have precluded the government from establishing a particular religious conception of marriage.

<sup>50</sup> *Roberts v. Bradfield*, 12 App.D.C. 453, \_\_\_ (1898). The Court reasoned (somewhat unpersuasively) that the hospital was serving a secular (but not a religious?) purpose.

<sup>51</sup> *Id.* at \_\_\_ (emphasis added).

<sup>52</sup> See, e.g., Levy, *supra* note 40, at 91; Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 12.2.1 (2d. ed. 2002).

<sup>53</sup> Bartrum, *Of Historiography and Constitutional Principle*, *supra* note 15, at \_\_\_.

<sup>54</sup> See *Bradfield v. Roberts*, 175 U.S. 291 (1899).

adopt the inclusive gloss on the letter effectively foreclosed a possible further metonymic meaning of the wall metaphor—inclusivism—and, indeed, fifty years later the Court would construct a very different meaning in its place.

By the middle of the twentieth century, the Court had survived the difficult early years of the New Deal and emerged with a profoundly enlarged conception of federal authority. Encouraged by Justice Hugo Black, it began to incorporate the protections of the Bill of Rights into those substantive liberties the Fourteenth Amendment guards from state encroachment. The Establishment Clause, however, settled awkwardly into Black’s vision of “total” incorporation—which mechanically enforced the first eight amendments against the states in their entirety—precisely because the clause was originally meant to *reserve* a specific power (religious legislation) to the states within the federalist structure.<sup>55</sup> Black’s model of incorporation, however, would now strip the states of precisely this power.<sup>56</sup> For this result to make sense, the Court needed to flesh out some kind of “individual” disestablishment right, which the Fourteenth Amendment would protect from state intrusion. And, predictably, this individual right would derive from the substantive federal religious liberty the Court had begun to fashion in the territories.

Black started to outline the contours of this disestablishment privilege when the Court incorporated the Establishment Clause in *Everson*.<sup>57</sup> In considering the constitutionality of a New Jersey program that reimbursed parents for the cost of public transportation to parochial schools, Black began to construct a historical narrative—a normative ethos—in which to embed the emerging right.<sup>58</sup> After painting a dramatic picture of religious intrigue, persecution, and political redemption in early America, he reflected on the substance of the religious disestablishment Madison and Jefferson had envisioned in colonial Virginia.<sup>59</sup> Then, to connect these colonial thoughts to the constitutional founding, he invoked Jefferson’s

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<sup>55</sup> See AMAR, *supra* note 42, at 219 (discussing the difficulty of incorporating the Establishment Clause in the way Black envisioned).

<sup>56</sup> *Id.*

<sup>57</sup> *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 8 (1947).

<sup>58</sup> After all, as Robert Cover reminds us, every *nomos*—or communal legal structure—requires a justifying narrative. Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 1, 4 (1983).

<sup>59</sup> *Everson*, 330 U.S. at 16-18. Here, Black relied on two other canonical establishment texts: Madison’s *Memorial and Remonstrance Against Religious Assessments* and Jefferson’s *Virginia Statute of Religious Freedom*. *Id.*

wall metaphor at the end of a paragraph that would become a cornerstone of federal disestablishment doctrine:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer on religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess belief or disbelief in any religion. . . . In the words of Jefferson, the clause was intended to erect a “wall of separation between Church and State.”<sup>60</sup>

Here Black chose to employ the wall in support of what is often called a “strict separationist”—or what I have called an “exclusivist”—view of state neutrality towards religion, which enforces neutrality by *excluding* all religious groups from state aid programs.<sup>61</sup> This, of course, is a very different metonymic meaning than that which the appellate court had suggested in *Bradford*. Nonetheless, the *Everson* majority upheld the New Jersey busing program as providing merely an “incidental” benefit to religion—an outcome that provoked a sharp dissent from Justice Wiley Rutledge, who preferred an even stricter separation.<sup>62</sup> Rutledge, too, utilized the wall metaphor, lamenting that “[n]either so high nor so impregnable today as yesterday is the wall raised between church and state by ... the First Amendment,” but he went further by explicitly rejecting *Bradford’s* inclusivist conception:

The problem ... cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools of whatever faith, yet in the light of our tradition it could not stand. ... [I]t was the furnishing of “contributions of money for the propagations of faith which he disbelieves” that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but *complete separation*.<sup>63</sup>

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<sup>60</sup> *Id.* at 15-16 (emphasis added).

<sup>61</sup> Bartrum, *Of Historiography and Constitutional Principle*, *supra* note 15, at \_\_\_\_.

<sup>62</sup> *Everson*, 330 U.S. at 50 (Rutledge, J. dissenting).

<sup>63</sup> *Id.* at 52, 59-60 (Rutledge, J., dissenting) (internal citations omitted).

Just a year later the Court would consolidate the letter's canonical status as an exclusivist metonym in *McCullum v. Board of Education*, a case which tested the constitutionality of an Illinois program that brought private teachers into public schools for voluntary weekly religion classes.<sup>64</sup> *McCullum's* various opinions both cement the wall's place in the canon and clarify its metonymic meaning for future establishment argument. Writing again for the majority, Justice Black repeated the foundational paragraph from *Everson*, adding by way of explanation that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."<sup>65</sup> And he concluded with a rhetorical return to the now exclusivist symbolism of the Jefferson letter—the "wall between Church and State ... must be kept high and impregnable"—before invalidating the Illinois program.<sup>66</sup>

Black's short opinion was not enough for the *Everson* dissenters, however, who hoped to both fortify and expand exclusivist principles. Justice Felix Frankfurter began by suggesting that the Constitution must prohibit more than just the establishment of a national church, and proceeded to add metonymic mortar to the wall:

We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church." But agreement, in the abstract, that the First Amendment was designed to erect a "wall of separation between Church and State," does not preclude a clash of views as to what the wall separates. ... We cannot illuminatingly apply the "wall of separation" metaphor until we have considered the relevant history of religious education in America.<sup>67</sup>

And the historical narrative Frankfurter then presented—centered on the supposed battle to secularize public education against "fierce sectarian opposition"<sup>68</sup>—gave Jefferson's words a decidedly exclusivist gloss, as did his concluding thoughts: "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State

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<sup>64</sup> *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948). The program brought in privately funded instructors to teach Protestant, Catholic, and Jewish classes one day a week to the children of requesting parents. Students who elected not to participate received secular instruction in another classroom. *Id.* at 207-09.

<sup>65</sup> *Id.* at 212.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 213 (Frankfurter, J., concurring).

<sup>68</sup> *Id.* at 214. This battle was actually an effort to exclude Catholic teaching from what were universally acknowledged to be Protestant public schools—in which the King James Bible and Book of Common Prayer were central texts. See, Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy 1840-42*, 3 N.Y.U. J. OF L. & LIBERTY 267, 286-320 (2008).

speaks of a ‘wall of separation,’ not a fine line easily overstepped. It is the Court’s duty to enforce this principle in its full integrity.”<sup>69</sup>

Not everyone was thrilled with the Danbury letter’s emergence as an exclusivist metonym, however. Justice Robert Jackson, in concurrence, did not find the symbol so easy to interpret:

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy ... we are likely to make the legal “wall of separation between Church and State” as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.<sup>70</sup>

And Justice Stanley Reed, the lone dissenter, articulated real—and well-founded—historical reservations about the letter’s crystallizing metonymic meaning: “A reading of the general statements of eminent statesmen of former days ... will show that circumstances such as those in this case were far from the minds of the authors. The words and spirit of those statements may be wholeheartedly accepted without in the least impugning [the Illinois program].”<sup>71</sup> Reed went on to present a different history than had Frankfurter; using other materials he demonstrated that Jefferson envisaged a significant role for religion in the classrooms of the University of Virginia.<sup>72</sup> “Thus,” he concluded

the “wall of separation between Church and State” that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.<sup>73</sup>

But these doubts ran against the argumentative tide, and soon both sides of the neutrality debate would come to accept Jefferson’s wall as a powerful symbol of exclusivism. Over the next forty years, the Danbury letter made an appearance in exclusivist majority

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<sup>69</sup> *Id.* at 231.

<sup>70</sup> *Id.* at 237-38 (Jackson, J., concurring).

<sup>71</sup> *Id.* at 244 (Reed, J., dissenting).

<sup>72</sup> *Id.* at 245-48.

<sup>73</sup> *Id.* at 247.



opinions that struck down school prayer,<sup>74</sup> moments of silence,<sup>75</sup> nonsectarian graduation prayers,<sup>76</sup> public funding for Catholic school field trips,<sup>77</sup> a church's veto power over neighboring liquor licenses,<sup>78</sup> and tax benefits to parochial school parents<sup>79</sup>—and in exclusivist dissents against decisions that upheld the loan of textbooks to Catholic schools,<sup>80</sup> prayer at the opening of a state legislature,<sup>81</sup> and a private party's display of a cross on state capitol grounds.<sup>82</sup> Indeed, as is true with many symbols, the power of the wall's metonymic meaning is perhaps most apparent in the inclusivist opposition's vigorous efforts to tear it down.

The Court's seminal, and still paradigmatic, statement of inclusive neutrality appeared in 1952, just a few years after *McCollum*. In *Zorach v. Clauson*, five justices upheld a New York City program that permitted the children of requesting parents to leave school to receive weekly instruction at private religious centers.<sup>83</sup> Writing for the majority, Justice William Douglas began by acknowledging the exclusivist shadow of Jefferson's wall, but quickly began to pick at a few cracks in the mortar: "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. ... This is the common sense of the matter. Otherwise the Church and State would be aliens to each other—hostile, suspicious, and even unfriendly."<sup>84</sup> He then wrote a paragraph that has become an inclusivist cornerstone:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any group and that lets each flourish according to the zeal of its adherents and the appeal of

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<sup>74</sup> *Engel v. Vitale*, 370 U.S. 421, 426 (1962).

<sup>75</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>76</sup> *Lee v. Weisman*, 505 U.S. 577, 601 (1992) (Blackmun, J., concurring).

<sup>77</sup> *Wolman v. Walter*, 423 U.S. 229, 235 (1977).

<sup>78</sup> *Larkin v. Grendel's Den*, 459 U.S. 116, 123 (1982).

<sup>79</sup> *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 (1973).

<sup>80</sup> *Board of Educ. v. Allen*, 392 U.S. 236, 251 (Black, J., dissenting).

<sup>81</sup> *Marsh v. Chambers*, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting). Brennan outlined four purposes of the exclusive neutrality doctrine: (1) to prevent compelled support for another religion; (2) to prevent state interference with religious autonomy; (3) to protect religion from the degradation of state association; and (4) to prevent political divisiveness. *Id.* at 803-06.

<sup>82</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting).

<sup>83</sup> *Zorach v. Clauson*, 343 U.S. 306, 308 (1952). The challenged program was similar to the one struck down in *McCollum*, except in *Zorach* the religious instruction did not occur in the public school building.

<sup>84</sup> *Id.* at 312.

its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.<sup>85</sup>

For Douglas, exclusive neutrality was simply illogical: exclusivism could not claim to be truly neutral while forthrightly promoting a secular worldview. And, significantly, rather than try to incorporate the metaphor into his own argument, Douglas simply chose to ignore it. No longer even suggesting the nonpreferential reading from *Bradford*—which would erect the wall between the state and *sectarianism*—Douglas surrendered the Danbury letter to exclusivism.

Justice Potter Stewart kept inclusivism alive in his two scathing dissents in the school prayer decisions of the 1960s, though, for the time being, he did not mount another direct attack on Jefferson’s wall.<sup>86</sup> Beginning in the mid-1980s, however, the inclusivist siege began in earnest. Writing for the majority in *Lynch v. Donnelly*—a decision upholding a nativity scene on city property—Chief Justice Warren Burger offered the following thoughts: “The concept of a ‘wall’ of separation is a useful figure of speech probably deriving from the views of Thomas Jefferson ... But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”<sup>87</sup> Eschewing draconian exclusivism, Burger argued that “the Constitution [does not] require complete separation of church and state; it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility towards any.”<sup>88</sup>

But it was soon-to-be-Chief Justice William Rehnquist historically minded dissent in *Wallace v. Jaffree*—in which the majority struck down moments of silence at a public school—that truly defined the modern opposition to Jefferson’s wall and began its

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<sup>85</sup> *Id.* at 313.

<sup>86</sup> *Engel v. Vitale*, 370 U.S. 421, 445 (Stewart, J., dissenting); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

<sup>87</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1983).

<sup>88</sup> *Id.* (emphasis added).

decanonization. From the outset, Rehnquist challenged the Danbury letter's historical pedigree:

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written fourteen years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.<sup>89</sup>

Rehnquist turned instead to James Madison—who had, he thought, “two advantages over Jefferson in this regard: he was present in the United States, and he was a leading Member of the First Congress”—and looked particularly at Madison's efforts to craft a disestablishment amendment during the first session of Congress.<sup>90</sup> A review of the brief record of congressional debates satisfied Rehnquist that the First Amendment's “most important architect .... did not see it as requiring neutrality on the part of the government between religion and irreligion.”<sup>91</sup> Indeed, Rehnquist argued that the language proposed by the various states—which Madison seemed to endorse—reveals an amendment designed not to discourage religious observance, but to prevent sectarian preferentialism.<sup>92</sup>

Not content to rest with Madison, however, Rehnquist offered two additional pieces of historical evidence to discredit the exclusivist wall. First, he looked to the Northwest Ordinance—enacted on the same day that the First Congress took up the First Amendment—

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<sup>89</sup> *Wallace*, 472 U.S. 38, 92 (Rehnquist, J., dissenting).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 98. Ironically, a review of the very same materials would convince Leonard Levy that the Establishment Clause has a distinctly exclusivist meaning. LEVY, *supra* note 40, at 73-75. Levy argues that these debates demonstrate conclusively that Congress had no power to legislate on religion, and that Rehnquist's “nonpreferential” account depends upon some additional congressional authority. *Id.* at 84. While clever, Levy's argument has serious logical flaws. Although the original Establishment Clause—as a federalism provision—undoubtedly reserved authority over religion to the states, to suggest that the structural aspects of the federal amendment speak to the substance of church-state relations (again, an issue left to the states) is simply a category mistake. See Bartrum, *Of Historiography and Constitutional Principle*, *supra* note 15, at \_\_\_, n.86.

<sup>92</sup> *Wallace*, 472 U.S. 38, 93 (Rehnquist, J., dissenting). Virginia and North Carolina proposed identical language ensuring that “no particular religious sect or society ought to be favored or established, by law, in preference of others.” 3 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 659 (1891); 4 ELLIOT'S *DEBATES*, at 244. New York and Rhode Island likewise suggested that no “religious sect or society ought to be favored or established by law in preference to others.” 1 ELLIOT'S *DEBATES*, at 328, 334.

as a true indication of congressional intentions regarding the substance of federal disestablishment.<sup>93</sup> Again, because the federal government exercised State-like plenary power in the territories, it was here that the contours of federal church-state relations took shape.<sup>94</sup> Rehnquist pointed to the Ordinance’s declaration that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged” as evidence that Congress intended to actively encourage religion in the territories.<sup>95</sup> And, second, Rehnquist turned to a House of Representatives resolution (proposed just a day later) that asked President George Washington to issue a proclamation giving “Almighty God their sincere thanks for the many blessings he had poured down upon them.”<sup>96</sup> The House passed the resolution just over a month later, and President Washington issued the proclamation within a few weeks.<sup>97</sup> All of this was proof enough for Rehnquist that there was “simply no historical foundation for the ... ‘wall of separation’ that was constitutionalized in *Everson*.”<sup>98</sup> Indeed, rather than try to reclaim or refine the wall metonym, Rehnquist hoped simply to relegate Jefferson’s words to the constitutional dustbin: “We have done much straining since 1947, but still we admit that we can only dimly perceive the *Everson* wall. Our perception has been clouded not by the Constitution, but by the mists of an unnecessary metaphor.”<sup>99</sup>

By 2000, the Court’s ideological center had moved towards Rehnquist, and inclusivist efforts to dismantle the metonymic wall began to meet with more success. *Mitchell v. Helms* upheld a Louisiana program that provided teaching materials to religious and secular schools on an equal basis,<sup>100</sup> and *Good News Club v. Milford Central School* required a New York school that opened its gymnasium to community groups after hours to include religious groups on an equal basis.<sup>101</sup> Justice Clarence Thomas’s majority opinion in the latter case eagerly endorsed inclusive neutrality: “Because allowing [religious groups] to speak on

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<sup>93</sup> *Wallace*, 472 U.S. 38, 100 (Rehnquist, J., dissenting).

<sup>94</sup> See *supra* note 41 and accompanying text.

<sup>95</sup> *Wallace*, 472 U.S. 38, 100 (Rehnquist, J., dissenting) quoting Northwest Ordinance, 1 Stat. 50 (1789).

<sup>96</sup> *Wallace*, 472 U.S. 38, 101 (Rehnquist, J., dissenting) quoting 1 Annals of Cong. 914 (1789). Elias Boudinot, who proposed the resolution, also voted in favor of the Establishment Clause. *Id.*

<sup>97</sup> *Wallace*, 472 U.S. 38, 101-2 (Rehnquist, J., dissenting). John Adams, Washington’s successor, would also issue official proclamations of thanksgiving. *Id.*

<sup>98</sup> *Id.* at 93.

<sup>99</sup> *Id.* at 112 (internal quotations and citations omitted).

<sup>100</sup> *Mitchell v. Helms*, 530 U.S. 793, 873 (1999) (Souter, J., dissenting).

<sup>101</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001).

school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude [these groups].”<sup>102</sup> As a result of these changes on the Court—including a calculated shift towards free speech analysis<sup>103</sup>—exclusivists have found themselves increasingly called upon to defend the wall, and the once hard spot in the constitutional canon has begun to loosen and shift. So much so that in *Van Orden v. Perry*, a 2005 decision that upheld the display of a monument of the Ten Commandments on the Texas state capitol grounds, dissenting Justice John Paul Stevens was left desperately plugging holes in the eroding metonymic wall: “If any fragment of Jefferson’s metaphorical ‘wall of separation between church and State’ is to be preserved—if there remains any meaning to the wholesome ‘neutrality’ of which this Court’s Establishment Clause cases speak—[the Texas display must come down].”<sup>104</sup>

All of this is, I hope, a useful illustration of the emergence, evolution, and incipient decline of a canonical metonym within the historical modality of constitutional practice. Originally introduced as a means of bridging the gap between state and federal disestablishment principles, Jefferson’s Danbury letter—with its concise and powerful image of “a wall of separation between church and state”—fell quickly and neatly into the rhythms of constitutional argument. Over a few short years, metonymic associations began to accrete around the wall and cemented its place in the canon as seemingly imperturbable evidence of a founding commitment to exclusive neutrality. And, as is often the case, these emerging metonymic meanings were far removed from the letter’s original or literal meaning, which was a structural description of the relative authority of state and federal government over religious matters. It is, after all, not so much the letter’s historical significance, but rather its utility as a piece on the argumentative chess board, that ensured its place in the canon. But, perhaps inevitably, as the wall’s power and influence became more apparent, exclusivism’s ideological opponents made concerted efforts to discredit or dislodge it: in effect, to de-canonicalize it. While the focus of these particular efforts has been simply to devalue the wall as constitutional currency, the next section—which examines the evolution of a canonical piece

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<sup>102</sup> *Id.* at 114.

<sup>103</sup> See Ian Bartrum, *Pleasant Grove v. Summum: Losing the Battle to Win the War*, 95 VA. L. REV. IN BRIEF 43 (2009). This line of doctrine runs from *Widmar v. Vincent*, 454 U.S. 263 (1981) through *Lamb’s Chapel v. Center for Moriches Union Free School District*, 508 U.S. 384 (1993) and *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) to *Good News Club*, 533 U.S. 98 (2001).

<sup>104</sup> *Van Orden v. Perry*, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting) (internal quotations and citations omitted).

of doctrine—illustrates the sometimes more powerful technique of refining metonymic meanings to conform to a changing constitutional culture.

## II. DOCTRINE: THE LEGAL ACADEMY, *LOCHNER*, AND CANONICAL REFINEMENT

Of Bobbitt's six modalities, doctrinal argument, with its emphasis on stare decisis and neutral principles, relies perhaps more than any other on canonical texts, some of which have come to be known as "superprecedents."<sup>105</sup> But, for these same reasons, it may be surprising to discover that cases, too, can take on metonymic meanings divorced from their literal texts. Indeed, precisely because the skilled doctrinalist must be expert at distilling and recharacterizing precedents and neutral "tests," it is in this modality that some of the most dramatic recalibrations of metonymic meaning occur over time. This section examines one of the most canonical, or more precisely "anti-canonical," decisions rendered during the last century. Despite some recent rehabilitation,<sup>106</sup> *Lochner v. New York* remains among the more vicious doctrinal epithets one can hurl at a constitutional opponent.<sup>107</sup> But the accusation has changed over time, and in what follows I explore the ways that our constitutional practice, particularly in the academic sphere, has refined *Lochner's* metonymic meaning over the course of the last century.

Indeed, it is perhaps true that no case illustrates the metonymic nature of the constitutional canon better than *Lochner*. It has lent its name to an entire chapter of constitutional history: the so-called *Lochner* Era.<sup>108</sup> But what exactly are the associated meanings to which the metonym points us? What do we mean when we accuse someone of

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<sup>105</sup> Jeffrey Rosen, *So, Do You Believe in "Superprecedents"?*, N.Y. TIMES [section] 4, p.1 (Oct. 30, 2005).

<sup>106</sup> See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 101 (1991) (arguing the Court was properly fulfilling its "preservationist" function in our dualist democracy); OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 19 (1993) (describing *Lochner* as a reasonable "attempt to explicate and protect the constitutional ideal of liberty"); G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87 (1997) (challenging historical disapproval of *Lochner*); James W. Ely, *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 967 (1998) (describing conventional accounts of the *Lochner* Era as "winner's history"); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998) (attributing *Lochner* Era decisions to weakening police powers doctrine); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (locating *Lochner* in the fundamental rights tradition of substantive due process).

<sup>107</sup> See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003) ("*Lochner v. New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years.").

<sup>108</sup> There is some dispute as to when this phrase arose, but it gained widespread acceptance after Gerald Gunther used it in the 1970 edition of his popular casebook. GERALD GUNTHER & NOEL T. DOWLING, CONSTITUTIONAL LAW: CASES AND MATERIALS 982-84 (8th ed. 1970); accord David A. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1518 (2005).

“Lochnering”?<sup>109</sup> Some modern commentators have suggested that the case’s metonymic meaning remains unclear; that it is difficult to say with any certainty what is wrong with *Lochner*.<sup>110</sup> But this confusion is, I think, rhetorical, as scholars struggle to draw a principled distinction between the Court’s efforts to protect the liberty of contract in the early twentieth century, and its determination to enforce civil and reproductive rights under Earl Warren and Warren Burger.<sup>111</sup> I suggest that, in truth, all of these uncertainties—the revilement, the revision, the distinctions and clarifications—are simply part of an ongoing battle to distill *Lochner*’s metonymic meanings within constitutional practice. They are a manifestation of the continuing struggle to reclaim or refine the “hard” spot the case occupies in the constitutional riverbank; the perpetual effort to define what *Lochner* stands for, or, more importantly, what it stands against.

Having said all this, I believe that most lawyers—those blissfully unversed in the mounting academic literature—understand *Lochner* as a metonym for unbridled judicial activism; a shorthand description of a court overreaching its constitutional authority and thwarting majority will as represented in the legislature.<sup>112</sup> As such, the *Lochner* metonym reflects the core of the countermajoritarian objection to judicial review,<sup>113</sup> and its edge cuts against any advocate—no matter the ideology—who would use the courts to further a social or political agenda. And, because its invocation challenges a court’s very legitimacy when it reaches certain kinds of decisions or provides certain kinds of relief, *Lochner* has become a fascinating and powerful argumentative tool. In what follows, I trace *Lochner*’s journey into infamy and the constitutional anti-canon, but I also hope to account for more recent efforts to refine or distill it metonymically. In the process, I will suggest that *Lochner* provides a particularly striking example of the legal academy’s impact on the constitutional canon and,

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<sup>109</sup> BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 269 (1998); accord HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 4 (1993) (using the term “Lochnerizing”).

<sup>110</sup> Strauss, *supra* note 104, at 374 (“The striking thing about the disapproval of *Lochner*, though, is that there is no consensus why it is wrong.”).

<sup>111</sup> See *id.* (“The puzzle, for anyone who generally accepts the way constitutional law has evolved over the last half century or so, is to find an argument against *Lochner* that would not undermine those developments as well.”).

<sup>112</sup> See Jack Balkin, “*Wrong the Day it Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 686 (2005) (arguing that the conventional account suggests that “the Justices during the *Lochner* Era repeatedly overstepped their appropriate roles as judges by reading their own political values into the Constitution”).

<sup>113</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d. ed. 1986) (describing the “Counter-Majoritarian Difficulty”).

by extension, constitutional meaning.<sup>114</sup> But, as before, I begin by putting the case's original or literal meaning in constitutional context.

The *Lochner* story begins during the late 1870s, when journeyman bakers in New York and other major cities began to unionize and push for labor reforms.<sup>115</sup> The largest and most powerful union to emerge consisted predominantly of German bakers—indeed, it was initially known in the press as the National Union of German Bakers—and in January of 1886 its members convened to seek a reduction of the average workday.<sup>116</sup> Despite some modern dispute,<sup>117</sup> it seems reasonably clear that the bakers had both economic and republican goals in mind.<sup>118</sup> In a call to arms, the *Baker's Journal*—the English language version of the union organ *Deutsche-Amerikanische Baeckerzeitung*—presented the resolutions that compelled the newly named Journeyman Bakers National Union to submit a maximum hours bill to the New York legislature in 1887:<sup>119</sup>

*Whereas* it is a well-known fact that the excessive work in the baker shops is undermining health and shortening the lives of those employed therein.

*Whereas* the journeymen bakers were hitherto compelled to work too many hours, inconsequence of which those having employment had to

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<sup>114</sup> As I have suggested elsewhere, there are many spheres or institutions of constitutional discourse and argument, among which are the academy, the courts, the bar, the legislature, and the executive branch. Bartrum *Metaphors and Modalities*, *supra* note 7, at 161.

<sup>115</sup> STUART B. KAUFMAN, *A VISION OF UNITY: THE HISTORY OF THE BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION* 3-5 (1986).

<sup>116</sup> *Id.* at 6. It is worth noting that the maximum hours issue was the catalyst for a great deal of the union organizing that occurred in the late nineteenth century. See DAVID ROEDIGER & PHILIP FONER, *OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY 19-42* (1989) (“[I]ncreasing attention to the hours issue was the key element in the transformation of labor’s consciousness and organization.”); accord PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 22 (1990) (“To a great extent early labor unions had organized around the issue of the eight-hour workday.”). In *John Swinton’s Paper*, a Michigan baker recounted the particular struggles faced in his industry: “We are having quite a time here with our bosses. One of them got wind we were going to ask for shorter hours and the first thing he did was discharge one of our boys. . . . I think very likely that there will be a boycott thrown . . . by the K[nights] of L[abor].” *Journeyman Bakers National Union*, JOHN SWINTON’S PAPER, (Jul. 10, 1887).

<sup>117</sup> Matthew Bewig, for example, contends that the bakers’ principal motivations were republican and communal, see Matthew S. Bewig, *Lochner v. The Journeyman Bakers of New York: The Journeyman Bakers, Their Hours of Labor, and the Constitution: A Case Study in the Social History of Legal Thought*, 38 AM. J. LEGAL HIST. 413, 419 (1994), while Richard Epstein argues that larger, unionized bakers (who did not often work more than ten hours per day) simply hoped to drive smaller “basement” bakeries (which relied on longer hours) out of business, see Richard Epstein, *The Mistake of 1937*, 11 GEO. MASON U.L. REV. 5, 17-18 (1988). Paul Kens strikes a seemingly sensible path somewhere down the middle of these two positions, see KENS, *supra* note 114, at 15.

<sup>118</sup> Bewig, *supra* note 115, at 431-4.

<sup>119</sup> It appears that, going into the union convention, some bakers worked “as many as eighteen hours a day,” and thus resolved to settle for a ten or twelve-hour work day as anything shorter simply “could not be gained.” George Block, *The Bakers*, JOHN SWINTON’S PAPER (Feb. 17, 1886).



perform the work of two men while a great many had to go idle for want of work.

*Whereas* as a result of this great abuse one part of the journeymen bakers ruined themselves by overwork, while the other portion, being idle, were a prey to abject misery through the enforced idleness.

*Whereas* in consequence of this state of affairs, those employed in the bakeries were bodily and mentally degenerated to a degree unworthy of citizens belonging to a free commonwealth

*Be it resolved*, that we look upon the bill now before the Legislature, making ten hours a day's work in bakeries, as a measure to elevate the condition of journeymen bakers bodily and mentally, which should be adopted without delay by the Assembly after its passage in the Senate.

*Resolved*, that the law is not only a measure for the interest of public health, but it will also be in the interest of morality and civilization, securing liberty to a class literally enslaved by their calling.<sup>120</sup>

While it is fascinating to note how these arguments track the issues that would eventually animate and (perhaps unconsciously) divide the Supreme Court, the first bakery bill failed to capture a majority of the State Assembly, and the journeyman bakers left Albany empty handed.<sup>121</sup>

It would take eight years and a series of muckraking newspaper reports by *New York Press* editor Edward Marshall—likely coordinated with Union leader Henry Weismann—to generate sufficient public outcry behind a renewed push for maximum hours legislation.<sup>122</sup> In late September of 1894, Marshall published a vivid description of the wretched and unhealthy conditions prevalent in tenement basement bakeries under the provocative headline “Bread and Filth Cooked Together.”<sup>123</sup> Marshall followed up with a series of reports on the dangers that the basement bakeries—and the “wage slaves” working interminable hours within—presented to public health and the moral community.<sup>124</sup> These articles and corroborating state inspections eventually prompted public calls for the legislature to again consider action to reform the baking industry.<sup>125</sup>

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<sup>120</sup> *The Grand Mass-Meeting*, BAKER'S JOURNAL (April 27, 1887); accord Bewig, *supra* note 115, at 431 (quoting a later, modified version of the resolutions).

<sup>121</sup> Bewig, *supra* note 15, at 431. The bill passed the Senate but failed in the assembly 56-45. *Id.*

<sup>122</sup> KENS, *supra* note 114, at 50-53.

<sup>123</sup> NEW YORK PRESS, (Sept. 30, 1894). The plight of the tenements and their occupants was a common theme in the labor press as well, see, e.g., *Pest Breeding Tenements*, JOHN SWINTON'S PAPER (Dec. 20, 1885); *Pest Breeding Tenements*, JOHN SWINTON'S PAPER (Jan. 3, 1886). The effort to link bakery work with the general tenement problem was therefore a well-calculated one. KENS, *supra* note 114, at 50-55.

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<sup>125</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1479-80.

New York lawmakers based the Bakeshop Act, as it was called, largely on similar regulations enacted in England<sup>126</sup>—with the major addition of a provision limiting the time “biscuit, bread or cake bakery” employees could work to ten hours in a day or sixty hours in a week.<sup>127</sup> As such a substantial addition, it seems unlikely that the hours limitation was a trivial or unnoticed inclusion in the bill—although it does seem slightly out of keeping with the Act’s other sanitary regulations<sup>128</sup>—or that it was included at the eleventh hour to appease Union lobbyists. Indeed, the provision occupied a place of prominence as Section One, and there is evidence that the word “person” in the first sentence was changed to “employee” to allay last minute constitutional concerns.<sup>129</sup> This final change assumes all the more significance because it seems to have been nearly the only issue of concern to lawmakers, as the bill sailed unanimously through the both the Senate (29-0) and the State Assembly (90-0) and became law on May 2, 1895.<sup>130</sup> The somewhat surprising universal support, which would later provide ammunition for the Court’s countermajoritarian critics, likely resulted from a lack of political organization among bakery owners; the division of interests between large bakeshops and smaller basement bakeries; and the thought that state regulation would better the reputation, and thus the profits, of bakers generally.<sup>131</sup>

The Act’s final provisions authorized its enforcement through the routine visits of state factory inspectors and their deputies,<sup>132</sup> whose reports show that for the first few years the new law was fairly ineffective.<sup>133</sup> In fact, in 1897 only 312 of the 855 bakeries inspected

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<sup>126</sup> *Id.*

<sup>127</sup> The first section of the Bakeshop Act read as follows:

No employee shall be required, permitted, or suffered to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week, nor more hours in a any one week than will make an average of ten hours per day for the whole number of days in which such person shall so work during such week.

N.Y. LAWS, ch. 415, art. 8, § 110 (1895) *reprinted in* KENS, *supra* note 114, at 169.

<sup>128</sup> Describe provisions...

<sup>129</sup> KENS, *supra* note 114, at 58. This change allowed bakery *owners* to continue working as long as they wished.

<sup>130</sup> *Id.* at 59.

<sup>131</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1482-83.

<sup>132</sup> N.Y. LAWS, ch. 415, art. 8, § 116 (1895) *reprinted in* KENS, *supra* note 114, at 170.

<sup>133</sup> ROEDIGER & FONER, *supra* note 113, at 157.

complied with the maximum hours provision.<sup>134</sup> By 1899, it appears that most of the unionized bakeries observed the ten-hour limit,<sup>135</sup> though it is less clear what was happening in the city basements. In practice, it was the Union's, rather than State's, enforcement efforts that were the key to law's success in those areas where it was observed. The State Factory Inspector himself conceded as much: "The hours of labor in bakeshops cannot be successfully regulated in my opinion but in one way, and that is by a thorough and complete organization by the craft itself."<sup>136</sup> But it was perhaps in this capacity, as a rallying point for Union activity and membership, that the Bakeshop Act was most significant and presented the biggest threat to laissez-faire economics and the bakery owners.<sup>137</sup>

And, in the meantime, those owners had begun to accumulate more political power, including the defection to their ranks of the shrewd and influential Union leader Henry Weismann, who had been instrumental in getting the Bakeshop Act passed.<sup>138</sup> Judicial events also began to inspire hope in the newly formed Master Baker's Association that organized opposition to the sixty-hour limitation might eventually bring it down.<sup>139</sup> Picking up on Justices Stephen Field's<sup>140</sup> and Joseph Bradley's<sup>141</sup> dissents in the *Slaughterhouse Cases* and *Munn v. Illinois*, some state courts had begun to find merit in Thomas Cooley's ideas about constitutional property rights and what would come to be known as "substantive due process."<sup>142</sup> To protect the "constitutional privilege" of contract, the Pennsylvania Supreme

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<sup>134</sup> Sidney G. Tarrow, *Lochner v. New York: A Political Analysis*, 5 LABOR HIST. 277, 289 (1964). This was partly a problem of getting workers to report their employers. *Id.* at 288.

<sup>135</sup> *Id.* at 290; accord ROEDIGER & FONER, *supra* note 113, at 157.

<sup>136</sup> Testimony of Daniel O'Leary, Factory Inspector of the State New York, to the U.S. Industrial Comm'n (March 8, 1899) *quoted in* Tarrow, *supra* note 132, at 289.

<sup>137</sup> Tarrow, *supra* note 132, at 290.

<sup>138</sup> KENS, *supra* note 114, at 98-99. Weismann had a falling out with the Union over corruption charges and resigned in 1897. He then opened a bakery of his own and began to appreciate the owners' side of the issue. *Id.*

<sup>139</sup> Tarrow, *supra* note 136, at 291-93.

<sup>140</sup> *Slaughterhouse Cases*, 83 U.S. 36, 105-06 (1873) (Field, J., dissenting) (arguing that the privileges and immunities clause must jealously guard the "sacred right of labor"); *Munn v. Illinois*, 94 U.S. 113, 136 (1876) (Field, J., dissenting) (finding doctrine that allows legislative regulation of businesses affected with the public interest "subversive of the rights of property").

<sup>141</sup> *Slaughterhouse Cases*, 83 U.S. at 116 (Bradley, J., dissenting) (locating the right to property among "the fundamental rights which can only be taken away by due process of law"). For a useful history of these developments in the Supreme Court, see EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT 130-45 (1948).

<sup>142</sup> See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 508-510 (7th ed. 1903) (developing idea of substantive limitations on legislatures that protect certain "vested rights" encompassed in the Fourteenth Amendment's Due Process Clause). As late as 1948, Edward Corwin would call Cooley's book—originally published in 1868—"the most influential treatise ever published on constitutional law," and his ideas about

Court had invalidated legislation prohibiting payments in the form of company store credit;<sup>143</sup> the Nebraska Supreme Court had struck down an hours limitation for mechanics and laborers;<sup>144</sup> and the Illinois Supreme Court had invalidated a similar restriction for women factory workers.<sup>145</sup> Closer to home, the New York Court of Appeals had upheld some workplace regulations as within the state police power,<sup>146</sup> but was generally gaining a reputation as hostile towards legislation abridging the right to sell one's labor.<sup>147</sup> And the United States Supreme Court, which had grudgingly upheld labor laws through the 1880s,<sup>148</sup> finally seemed to turn in the master bakers' favor when it struck down a Louisiana law that interfered with the fundamental "right to contract."<sup>149</sup> True enough, the Court subsequently upheld a maximum hours law governing Utah miners,<sup>150</sup> but overall judicial developments augured well enough for the master bakers that by 1901 they were ready to challenge the Bakeshop Act in state court.<sup>151</sup>

Joseph Lochner operated a non-union bakery in Utica, New York, and he had steadily resisted efforts to enforce the maximum hours provision.<sup>152</sup> When the Union filed a complaint and had him arrested for a second time, the master bakers decided to use his case to

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property rights, in particular, had wide currency. CORWIN, *supra* note 140, at 116. On the seeds of substantive due process, see KENS, *supra* note 115, at 87-89, though it is worth noting that the doctrine did not formally distinguish between "substantive" and "procedural" due process until the 1950s. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000).

<sup>143</sup> *Godcharles v. Wiegman*, 6 A. 354, 356 (Pa. 1886).

<sup>144</sup> *Low v. Rees Printing Co.*, 59 N.W. 362, 368 (Neb. 1894).

<sup>145</sup> *Ritchie v. People*, 40 N.E. 454, 462 (Ill. 1895). Other notable state cases vindicating the liberty of contract were: *State v. Haun*, 59 P. 340, 344-45 (Kan. 1899); *Leep v. Railway Co.*, 25 S.W. 75, 83 (Ark. 1894); *State v. Loomis*, 22 S.W. 350, 353 (Mo. 1893); *People v. Perry*, 28 N.E. 1126, 1127 (Mass. 1891); *State v. Fire Creek Coal & Coke Co.*, 10 S.E. 288, 289 (W.Va. 1889).

<sup>146</sup> *See, e.g.*, *People v. Ewer*, 36 N.E. 4 (N.Y. 1894) (upholding ban on child labor in theaters); *People v. Havnor*, 43 N.E. 541 (N.Y. 1896) (upholding prohibition on Sunday barber shops in Brooklyn); *accord* Felice Batlan, *A Reevaluation of the New York Court of Appeals: The Home, The Market, and Labor, 1885-1905*, 27 LAW & SOC. INQ. 489 (2002) (reviewing cases).

<sup>147</sup> Of particular renown was *In re Jacobs*, 98 N.Y. 98 (1885), which struck down a law that banned cigar-making in city tenements, but the court had also invalidated a minimum wage law and derided other "paternal" kinds of labor regulations in *Rodgers v. Coler*, 59 N.E. 716 (N.Y. 1901). *Accord*, Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1489.

<sup>148</sup> *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) ("If, therefore, a statute purporting to have been enacted to protect the public health . . . is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge."); *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888) (upholding prohibition on oleo margarine sales because it did not "infringe[] rights secured by fundamental law").

<sup>149</sup> *Allegeyer v. Louisiana*, 165 U.S. 578, 590 (1897) (invalidating prohibition on entering into insurance contracts with companies not in compliance with state laws).

<sup>150</sup> *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>151</sup> Tarrow, *supra* note 136, at 293.

<sup>152</sup> *Id.*

test the Bakeshop Act's constitutional merits.<sup>153</sup> At trial in early 1902, Lochner offered no plea and no defense, and instead accepted his conviction to set the stage for an appeal on the question of law.<sup>154</sup> His first appeal was to the Appellate Division of the New York Supreme Court, which split three to two against him.<sup>155</sup> Writing for the majority, Judge John Davy held that the Bakeshop Act, including the hours limitation, fell within the state legislature's inherent police powers, and thus did not violate Lochner's due process rights.<sup>156</sup> But this was not the master bakers' only—or even, perhaps, their strongest—constitutional claim. Since the Civil War, courts had grown increasingly suspicious of labor laws that appeared to single out particular industries for regulation.<sup>157</sup> If a law of this kind was deemed arbitrary or unreasonable, a court might strike it down under the Equal Protection Clause as illegal “class legislation.”<sup>158</sup> Confident of a better reception for both this and their due process arguments,<sup>159</sup> the bakers' decide to take their appeal to New York's highest court.

It was not to be, however, as the Court of Appeals once again upheld Lochner's conviction, this time in a four to three split.<sup>160</sup> Chief Judge Alton Parker, who would parlay progressive support into that year's Democratic presidential nomination,<sup>161</sup> wrote the majority opinion rejecting the bakers' Fourteenth Amendment claims.<sup>162</sup> He began by reviewing both state and federal precedents placing the authority to protect the public health firmly among the legislature's police powers.<sup>163</sup> Then, relying particularly on the Supreme Court's decision in *Holden v. Hardy* (the Utah mining case),<sup>164</sup> Parker self-consciously deferred to the legislature's judgments on how best to ensure healthy bakeries and bakers:

[W]e must assume—even if the object of the legislature in limiting the hours of work of employees is not to protect the health of the

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<sup>153</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1487.

<sup>154</sup> *Id.* On trial date, *see* *People v. Lochner*, 76 N.Y.S. 396 (1902).

<sup>155</sup> *Lochner*, 76 N.Y.S. at 396.

<sup>156</sup> *Id.* The opinion is not entirely clear as to whether it is addressing the equal protection claim, the due process claim, or both. Based on the cases discussed, however, it appears the court was more focused on the due process arguments.

<sup>157</sup> *See* GILLMAN, *supra* note 108, at 62-63.

<sup>158</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1488.

<sup>159</sup> It is perhaps worth noting that some courts still styled this as both a due process *and* a privileges and immunities claim, despite the near annihilation of the latter clause in the *Slaughterhouse Cases*. *See* *People v. Lochner*, 69 N.E. 373, 375 (N.Y. 1904) (discussing right of contract as privileges and immunities claim).

<sup>160</sup> *Lochner*, 69 N.E. at 373.

<sup>161</sup> Tarrow, *supra* note 136, at 295.

<sup>162</sup> *Lochner*, 69 N.E. at 381.

<sup>163</sup> *Id.* at 374-77.

<sup>164</sup> 169 U.S. 366 (1898). *See* note 148 *supra* and accompanying text.

general public, who take wares made by such employees—that the legislature intends to protect the health of the employees in such establishments; that, for some reason sufficient to it, it has reached the conclusion that in work of this character men ought not to be employed more than an average of ten hours a day.<sup>165</sup>

And, given appropriate judicial deference, he concluded that the Bakeshop Act fell well within the state’s constitutionally reserved police powers.<sup>166</sup> In a notable concurrence that presaged Louis Brandeis’ famous brief of a few years later,<sup>167</sup> Judge Irving Vann provided his own social science data to support the law’s stated purpose.<sup>168</sup> The dissenting judges, by contrast, felt less deferential and more confident in their own authority to declare the legislature’s health pretensions “a mere disguise that is not sufficient to save the statute from condemnation.”<sup>169</sup>

Disheartened by this latest failure, the master bakers’ principal attorney resigned and advised them not to waste money on what he thought was a hopeless appeal to the Supreme Court.<sup>170</sup> Undaunted, the Master Bakers Association decided to take up a collection from its membership to fund the federal appeal, and promptly hired former Union leader Henry Weismann to take the lead.<sup>171</sup> In the meantime, the case garnered growing national attention, partly due to Judge Parker’s presidential campaign, but also through the bakers’ concerted efforts to publicize their complaint.<sup>172</sup> As a result, the Association remained quietly hopeful as it awaited the Court’s decision through the early months of 1905; still, in truth, it must have been something of a pleasant surprise when, on April 17, a divided Court declared section one of the Bakeshop Act unconstitutional.<sup>173</sup> Equally surprising, Chief Justice Rufus Peckham’s majority opinion eschewed the class legislation argument and analyzed the case under the Due

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<sup>165</sup> *Lochner*, 69 N.E. at 380.

<sup>166</sup> *Id.*

<sup>167</sup> See Brief for Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107) reprinted in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63 (Philip B. Kurland & Gerhard Casper, eds., 1975).

<sup>168</sup> *Lochner*, 69 N.E. at 382-84 (Vann, J., concurring).

<sup>169</sup> *Id.* at 387 (O’Brien, J., dissenting).

<sup>170</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1491.

<sup>171</sup> *Id.* Sydney Tarrow would later characterize Weismann’s pivotal role in both creating and destroying the Bakeshop Act as “the choicest irony of all.” Tarrow, *supra* note 136, at 298.

<sup>172</sup> Tarrow, *supra* note 136, at 295.

<sup>173</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

Process Clause; a decision which would ultimately set *Lochner* on a collision course with the constitutional anti-canon.<sup>174</sup>

From the outset, Peckham made it clear that the liberty of contract fell squarely within the emerging constellation of substantive rights implicit in the Fourteenth Amendment's due process guarantee:

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment.<sup>175</sup>

He conceded that certain inherent state powers—those related to the “safety, health, morals, and general welfare of the public”—might temper this liberty, but such concerns could not justify the Bakeshop Act because there was “no fair doubt that the trade of the baker, in and of itself, is not an unhealthy one.”<sup>176</sup> Despite offering this *ipse dixit*—and further opining that Act's “real object and purpose [was] simply to regulate the hours of labor between the master and his employees”<sup>177</sup>—Peckham nevertheless insisted the decision was “not a question of substituting the judgment of the court for that of the legislature.”<sup>178</sup>

Four Justices were not convinced, however, and Oliver Wendell Holmes's short dissent would, in future years, become as significant within constitutional practice as the majority opinion. While his mordant observation that “the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics” has perhaps gotten the most attention, Holmes most clearly expressed the fundamental basis of his dissidence in the first few sentences: “I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.”<sup>179</sup> This bare statement of judicial conservatism and deference—obviously problematic in its own right as a constitutional maxim—would

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<sup>174</sup> *Id.* at 53; accord Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1497.

<sup>175</sup> *Lochner*, 198 U.S. at 53 (internal citations omitted).

<sup>176</sup> *Id.* at 53, 59.

<sup>177</sup> *Id.* at 64.

<sup>178</sup> *Id.* at 56-57.

<sup>179</sup> *Id.* at 75 (Holmes, J., dissenting).

provide the theoretical contrast against which future lawyers would posit the doctrinal sin of “Lochnering.” Indeed, as *Lochner*’s infamy grew, Holmes’s dissent assumed a corresponding place of prominence within the constitutional canon—or perhaps it is the other way around.<sup>180</sup>

For the time being, however, Holmes and Justice John Marshall Harlan, who also wrote in dissent, were simply friends of the modern Progressive, standing up for labor against the old guard of the American free market. And, while perhaps unexpected, Peckham’s majority opinion was by no means a sharp break with constitutional culture or practice.<sup>181</sup> Quixotically, it might even have been seen as the latest salvo in a libertarian tradition stretching back to abolitionism; one which jealously guarded a freeman’s right to sell his labor on his own terms.<sup>182</sup> Certainly substantive due process doctrine, and the “liberty of contract” in particular, had juridical opponents in 1905, but, by any clear-eyed assessment of its literal terms, the *Lochner* decision intimated nothing of the ignominy that was to come with the next century of constitutional argument. And, while much of that disrepute undoubtedly grew out of the decisive shifts in economic circumstance and policy that occurred in the 1930s, *Lochner*’s status as an anti-canonical metonym emerged in large part from within the legal academy.

Although the decision elicited only a muted response from the union press (perhaps because it had little practical effect),<sup>183</sup> it prompted thoughtful and respected criticism in legal journals. Ernst Freund published a multi-faceted reproach in *Green Bag*, in which he took the Court to task on doctrinal, structural, prudential, and even analytical grounds, ultimately suggesting that “[a] decision that reads into the Fourteenth Amendment a vague and controverted concept of the liberty of contract, is a novel, and hardly a fortunate step in the development of our constitutional law.”<sup>184</sup> As a doctrinal matter, Freund argued that *Holden*

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<sup>180</sup> For a fascinating discussion of the relationship between judicial dissent and canonical development, see Primus, *supra* note 3, at 252-64; and Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent in Supreme Court Jurisprudence*, 52 RUTGERS L. REV. 781, 788-90 (1999).

<sup>181</sup> See, e.g., ACKERMAN, TRANSFORMATIONS, *supra* note 108, at 280 (arguing that the *Lochner* Court was simply applying the constitutional values bequeathed them by Reconstruction).

<sup>182</sup> See, e.g., Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867-1937*, YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 20, 26-29 (1984) (discussing anti-slavery roots of the liberty of contract).

<sup>183</sup> See Tarrow, *supra* note 136, at 298 (quoting the *Baker’s Journal* as boasting that the unions “had lost nothing by having the ten-hour day declared unconstitutional”). The case did receive national attention—at least in the short term—in more traditional newspapers. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1450 (2001) (reviewing coverage).

<sup>184</sup> Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 414 (1905).



v. *Hardy* should have controlled the outcome in *Lochner*, but of more interest is his structural suggestion that, in general, the Supreme Court should defer to a state court's judgment about how broadly the Fourteenth Amendment restricts the legislative prerogative:

A decision of a state court even of last resort, giving an unduly wide scope to the rights of liberty or of property as against the legislative power, is inconclusive in so far as it interprets the Fourteenth Amendment; and although its construction of the state constitution is conclusive, that constitution can be changed with comparative facility . . . . But a decision of the Supreme Court, interpreting the Fourteenth Amendment to the prejudice of legislative power, not only nullifies state constitutional amendments seeking to neutralize the effects of decisions of state courts, but in its turn, would be practically irreversible . . . for the difficulties in the way of changing the Fourteenth Amendment are almost insuperable. That amendment ought, therefore, to be interpreted so as to enforce only that fundamental law *quod semper, quod ubique, quod ab omnibus*, which is uniformly recognized as binding by civilized nations.<sup>185</sup>

Freund's thrust here is undoubtedly aimed at judicial activism, though not quite the same species of politicized activism with which *Lochner* would later come to be associated. Rather, he urges a kind of modest structural conservatism—perhaps something roughly analogous to Alexander Bickel's prudentialist “passive virtues”<sup>186</sup>—although, concededly, he does more radically suggest that fundamental due process rights should be limited to those long recognized by everyone everywhere.

Equally unimpressed with the liberty of contract's historical or intellectual pedigree was Roscoe Pound, who began his *Lochner* commentary by scouring the classics of natural law theory for the supposedly fundamental right.<sup>187</sup> These efforts were, of course, fruitless; yet Pound had no trouble locating the novel privilege in recent judicial opinions from around the country.<sup>188</sup> He attributed this incongruity to seven factors, the most interesting of which he described as the prevalence of a “mechanical jurisprudence”; or a “condition of juristic thought and judicial action . . . in which conceptions are developed logically at the expense of practical results.”<sup>189</sup> To Pound's mind, judges weaned on the fiction of theoretically absolute common law principles would hold stubbornly to “predetermined conceptions . . . often in the

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<sup>185</sup> *Id.*

<sup>186</sup> See BICKEL, *supra* note 112, at 111-198 (discussing the “passive virtues” of judicial restraint).

<sup>187</sup> Roscoe Pound, *Liberty of Contract*, 28 YALE L. J. 454, 454-57 (1909).

<sup>188</sup> *Id.* at 460-66 (reviewing cases).

<sup>189</sup> *Id.* at 457.

teeth of the actual facts.”<sup>190</sup> Thus, actual social circumstance and relative bargaining power notwithstanding, legislative attempts to even the industrial playing field were held to infringe on a theoretical—and so factually unimpeachable—equality.<sup>191</sup> Pound’s remedy for this mechanistic disease was what he called a “sociological jurisprudence”; one that tailored “principles and doctrines to the human conditions they are to govern rather than to assumed first principles.”<sup>192</sup> The trouble with *Lochner*, then, was not that the Court was too activist, but that it was too conservative. A blind adherence to formalistic principles and traditional categories not only impeded political activism and progressive growth in the legislatures, it actually stripped the *courts* of a power they might rightly assume to take notice of the world and adjust the law accordingly. Neither Freund nor Pound, then, saw the precise metonymic meanings that *Lochner* would assume in the latter half of the century, but the general shape of the emerging constitutional complaint is certainly evident in these initial commentaries.

The contours of what would become the conventional metonym came into sharper focus in Learned Hand’s analysis of the due process question in the Harvard Law Review.<sup>193</sup> Through careful doctrinal argument, Hand demonstrated that the majority had abandoned the historical understanding of “due process” as the “customary or common process of law” in favor of a conception that saw “the function of the Court [as analogous to] the function of a court in review of the facts.”<sup>194</sup> In other words, the Court had positioned itself as the final arbiter of whether a liberty-limiting statute had sufficient (or “due”) relation to a constitutionally valid purpose; and it would overturn those laws whose infirmity was “obvious beyond peradventure.”<sup>195</sup> This revised due process doctrine, Hand argued, raised questions much larger than the merits of maximum hours legislation:

Whether it be wise or not that there should be a third camera with a final veto upon legislation with whose economic or political expediency it totally disagrees, is a political question of the highest importance. In particular it is questionable whether such a power can endure in a democratic state, while the Court retains the irresponsibility of life tenure, and while its decisions can be reversed only by the cumbersome process of a change of the federal

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<sup>190</sup> *Id.* at 462.

<sup>191</sup> *Id.* at 463.

<sup>192</sup> *Id.* at 464. On “sociological jurisprudence” see Roscoe Pound, *The Need of A Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

<sup>193</sup> Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1907).

<sup>194</sup> *Id.* at 500.

<sup>195</sup> *Id.*

Constitution. . . . [I]f the Court is to retain the absolute right to pass in the final result on the expediency of statutes passed by the legislature, the difficulty is inherent and in the end may demand some change, either in the Court or in the Constitution.<sup>196</sup>

Here, then, are the seeds of the *Lochner* we love to hate; a decision whose symbolic overreach calls into doubt the very institution of judicial review.<sup>197</sup> And they emerged as theoretical objections in the pages of legal scholarship—some admittedly penned by a prominent judge—because, in truth, *Lochner* had very little doctrinal or practical effect over the next decade.

In those areas where union membership was strong, the ten-hour day remained largely in force; and in other areas the Bakeshop Act had never had much purchase to begin with.<sup>198</sup> For its part, the Court actually upheld the majority of labor legislation that came before it over the next decade.<sup>199</sup> In fact, in 1914 Congress enlarged the Court’s jurisdiction over state court judgments in order to *protect* progressive labor legislation from overzealous state judges.<sup>200</sup> Writing in the Harvard Law Review in 1915, Felix Frankfurter concluded that, “the groundwork of the *Lochner* case has by this time been cut from under. .... The fundamental constitutional doctrine of the assumption of rightness of legislative conduct, where the court is uninformed, is again rigorously being enforced.”<sup>201</sup> And in 1917 *Lochner* itself seemed to fall by implication in *Bunting v. Oregon* when the Court—amidst a flurry of pro-labor decisions<sup>202</sup>—upheld a ten-hour workday for workers “employed in any mill, factory or manufacturing establishment.”<sup>203</sup> But the judicial tide would turn swiftly and dramatically in

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<sup>196</sup> *Id.* It is interesting to note Hand’s call for change “either in the Court or in the Constitution” in light of what would occur in 1937; undoubtedly a change in the Court, and, some would argue, also a change in the Constitution. See ACKERMAN, *supra* note \_\_\_, at \_\_\_\_.

<sup>197</sup> For contemporary agreement on this point see Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670 (1908).

<sup>198</sup> Tarrow, *supra* note 136, at 298.

<sup>199</sup> See, e.g., *Ellis v. United States*, 206 U.S. 246 (1907) (upholding eight hour workday for federal employees); *Miller v. Wilson*, 236 U.S. 373 (1915) (upholding hours law for female hotel workers); *Sturges & Burn Co. v. Beauchamp*, 231 U.S. 320 (1913) (upholding child labor law); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding hours law for female laundry workers); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907) (upholding safety regulations for mines); accord Charles Warren, *Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294-96 (1913).

<sup>200</sup> An Act to amend An Act to Codify, Revise and Amend the Laws Relating to the Judiciary, P.L. 63-224, 38 Stat. 790 (1914).

<sup>201</sup> Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 370 (1915).

<sup>202</sup> See *Hawkins v. Bleakly*, 243 U.S. 210 (1917) (upholding workman’s compensation law); *Simpson v. O’Hara*, 243 U.S. 629 (1917) (upholding minimum wage for women); *Wilson v. New*, 243 U.S. 332 (1917) (upholding eight hour workday and minimum wage for railworkers).

<sup>203</sup> *Bunting v. Oregon*, 243 U.S. 426, 433-34 (1917); accord Henry Wolf Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 12 (1924).

1920 with the election of Warren Harding, an event that would have profound consequences for both due process doctrine and the Court itself.

Death and old age conspired to give Harding four Supreme Court appointments in his shortened presidential term, and he took full advantage of the opportunity to reshape the constitutional debate on economic regulation.<sup>204</sup> Harding's appointments (Taft, Sutherland, Butler, and Sanford) immediately tilted the balance of the Court back in favor of the liberty of contract,<sup>205</sup> and it was over the next decade and a half that the "Lochner Era" truly took shape. Perhaps most notable was the Court's opinion in *Adkins v. Children's Hospital*, which resuscitated *Lochner* while striking down a minimum wage law for women and children in the District of Columbia.<sup>206</sup> Writing for the majority, Justice George Sutherland went to exaggerated lengths to emphasize the presumption of legislative constitutionality before settling on a decisive disjunctive: "But, if by clear and indubitable demonstration a statute be opposed to the Constitution, we have no choice but to say so."<sup>207</sup> And in marshalling cases against the contested law he quoted liberally from Peckham's opinion in *Lochner*, conceding only that "[s]ubsequent cases in this court have been distinguished from that decision, but the principles therein stated have never been disapproved."<sup>208</sup> In dissent, Chief Justice William Howard Taft questioned *Lochner's* doctrinal viability after *Bunting*: "The law [upheld in *Bunting*] covered the whole field of industrial employment and certainly covered the case of persons employed in bakeries. ... It is [thus] impossible for me to reconcile the *Bunting* case and the *Lochner* case, and I have always supposed that the *Lochner* case was thus overruled *sub silentio*."<sup>209</sup> But, even if *Bunting* had repudiated *Lochner*, *Adkins* now turned the tables again, as Sutherland returned the liberty of contract to constitutional glory in high rhetorical style: "To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot

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<sup>204</sup> Harding appointed William Taft following the death of Edward White; Edward Sanford after the death of Mahlon Pitney; Pierce Butler to replace the aging William Day (he lived one more year); and George Sutherland to succeed the resigned John Clarke.

<sup>205</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1507.

<sup>206</sup> *Adkins v. Children's Hospital*, 261 U.S. 525, 539 (1923). It is worth noting that, in reaction to *Adkins*, Thomas Reed Powell revived the academy's attacks on *Lochner*. Thomas Reed Powell, *Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 555-58 (1923).

<sup>207</sup> *Id.* at 544.

<sup>208</sup> *Id.* at 548-50.

<sup>209</sup> *Id.* at 563-64 (Taft, J., dissenting).

be better served than by the preservation against arbitrary restraint of the liberty of its constituent members.”<sup>210</sup>

Over the next ten years the Court would hand down several of its more infamous Lochner Era decisions, although on close inspection it is difficult to come up with the “nearly 200” total era cases later scholars would claim.<sup>211</sup> Among the better known are *Jay Burns Baking Co. v. Bryan*, which struck down a law regulating the weight of saleable bread loaves, and *Weaver v. Palmer Brothers Co.*, which invalidated a prohibition on the use of “shoddy” as upholstery stuffing.<sup>212</sup> The justices also narrowed or closely cabined existing exceptions to the doctrine, such as the exemption for businesses “affected with the public interest,”<sup>213</sup> and—perhaps most notably for future generations—began to expand substantive due process analysis to include new kinds of fundamental rights. In *Meyer v. Nebraska*, the Court struck down a prohibition on German language teaching, and Justice James McReynolds gave broad texture to an evolving list of Fourteenth Amendment liberties.<sup>214</sup> In many ways it is *Meyer*—and other “civil liberty” cases like it<sup>215</sup>—that would become the fulcrum of later debates about *Lochner*’s metonymic meaning, as commentators tried either to distinguish or conflate “good” (civil liberty) and “bad” (economic liberty) *Lochnering*.<sup>216</sup> The financial crash of 1929 and ensuing depression, however, drew the nation’s focus ineluctably to economic and

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<sup>210</sup> *Id.* at 561.

<sup>211</sup> *E.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 445 (12th ed., 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 at 567, n.2 (2d. ed. 1988). The number 200 (between 1890 and 1937) probably derives from Felix Frankfurter’s compilation of 220 decisions. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938). For a thorough breakdown of these cases positing a much lower number of actual due process decisions, see MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 34-40 (2001).

<sup>212</sup> *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926).

<sup>213</sup> *Charles Wolff Packing Co. v. Court of Indust. Relations*, 262 U.S. 522, 535-36 (1923).

<sup>214</sup> *Meyer v. Nebraska*, 262 U.S. 390, 398 (1923). These liberties included,

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

<sup>215</sup> *See, e.g.*, *Stromberg v. California*, 283 U.S. 359 (1931) (invalidating prohibition on display of a “red flag as an emblem of opposition to organized government”); *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating prohibition of Japanese schools); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (invalidating prohibition of private schools).

<sup>216</sup> *See discussion infra*

issues, and the Court's continuing efforts to preserve libertarian values and the laissez-faire market became politically untenable.<sup>217</sup>

The history of the Court's battle with Congress and the Executive between 1930 and 1937 is well documented, and I will not rehearse it here except to say that, as is true of many such narratives, the constitutional canon that began to emerge from the "switch in time that saved nine" was something akin to winner's history.<sup>218</sup> Two decisions handed down in 1938 struck at the very core of the old economic jurisprudence. *United States v. Carolene Products* fundamentally reoriented the relationship between Congress and the Court such that the justices would now presume economic regulations rested "upon some rational basis within the knowledge and experience of the legislators";<sup>219</sup> although in his fourth footnote Justice Harlan Stone laid the groundwork for a more active scrutiny of statutes infringing on certain civil liberties.<sup>220</sup> And the foundations of "mechanical jurisprudence"—Pound's bugaboo—began to crumble in *Erie Railroad v. Tompkins*,<sup>221</sup> which ended the Court's longstanding efforts to "constitutionalize the categories of the common law."<sup>222</sup> Finally, in 1941—just three days after Justice McReynolds (the last of the famed "four horseman") retired—the new Court drove a definitive stake through the heart of the old doctrine with its unanimous opinion in *United States v. Darby*.<sup>223</sup> But, even with the death of its era, *Lochner* itself did not take on particular metonymic significance for several decades<sup>224</sup>—and when the notoriety did come it was, again, begun in the academy.

Perhaps predictably, academic interest in *Lochner* began to pick up in the late 1960s and early 1970s, as the Warren Court reinvigorated substantive due process in cases like *Griswold v. Connecticut*<sup>225</sup>—which explicitly "reaffirm[ed] the principle" of *Meyer v.*

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<sup>217</sup> Bernstein, *A Centennial Retrospective*, supra note 107, at 1510.

<sup>218</sup> The phrase is Thomas Reed Powell's sardonic description of Justice Owen Roberts's doctrinal about face in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which defused President Roosevelt's court packing plan. See FISS, supra note 103, at 8 at n.30.

<sup>219</sup> *United States v. Carolene Products*, 304 U.S. 144, 152 (1938).

<sup>220</sup> *Id.* at 153 n.4.

<sup>221</sup> *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

<sup>222</sup> ACKERMAN, supra note 3, at 370.

<sup>223</sup> See *United States v. Darby*, 312 U.S. 100, 125 (1941) ("[I]t is no longer open to question that the fixing of a minimum wage is within the legislative power .... Nor is it any longer open to question that it is within the legislative power to fix maximum hours.").

<sup>224</sup> See Bernstein, *A Centennial Retrospective*, supra note 107, at 1510 (noting that *Lochner* was cited primarily for Holmes's dissent, and that, when it was discussed, it was "lumped ... in with other cases invalidating economic regulations").

<sup>225</sup> *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

*Nebraska* and *Pierce v. Society of Sisters*—and *Roe v. Wade*.<sup>226</sup> While the 1965 edition of Gerald Gunther’s widely used constitutional law textbook skipped right past *Lochner* and its progeny (going straight from the *Slaguhtherhouse Cases* to *Palko v. Connecticut*),<sup>227</sup> by 1970 Gunther had put together a new section entitled “Substantive Due Process and Economic Regulation: The Rise of Judicial Intervention,” in which he coined, or at least popularized, the phrase “Lochner Era.”<sup>228</sup> By 1975, developments merited an entire chapter—168 pages in length—entitled “Substantive Due Process: Rise, Decline, Revival,” with a lengthy section devoted to *Lochner*.<sup>229</sup> In the introduction, Gunther explained a felt need “to contrast more sharply the discredited use of [substantive due process] doctrine in an earlier era with its modern revival in the abortion and contraception decisions,”<sup>230</sup> though he later confided to Randy Barnett that he had juxtaposed *Lochner* with the Warren Court cases in an effort to discredit the modern decisions.<sup>231</sup> Meanwhile, Robert Bork reached back to *Lochner*, *Meyer*, *Pierce*, and *Adkins* as part of a scathing attack on *Griswold*, in which he argued that substantive due process “is and always has been an improper doctrine ... [which] requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not.”<sup>232</sup> And in a highly visible essay in the *Yale Law Journal*, John Hart Ely compared *Roe* to *Lochner*, emphasizing the latter’s disrepute: “The Court continues to disavow the philosophy of *Lochner*. Yet ... it is impossible candidly to regard *Roe* as the product of anything else.”<sup>233</sup> Indeed, Ely suggested that over the long term *Roe* might actually be more “dangerous” than *Lochner*, in that the modern Court held that abortion laws impinged a fundamental or “special” right and were thus subject to heightened judicial scrutiny—greater constitutional protection than was ever afforded the liberty of contract.<sup>234</sup>

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<sup>226</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>227</sup> GERALD GUNTHER & NOEL T. DOWLING, *CONSTITUTIONAL LAW: CASES AND MATERIALS* \_\_ (7th ed., 1965).

<sup>228</sup> GERALD GUNTHER & NOEL T. DOWLING, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 954, 963 (8<sup>th</sup> ed. 1970); Professor David Bernstein has undertaken a fascinating review of *Lochner*’s evolving treatment in popular textbooks during this period. See Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1518 n.317.

<sup>229</sup> GERALD GUNTHER & NOEL T. DOWLING, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 548-656 (9th ed., 1975).

<sup>230</sup> *Id.* at xx.

<sup>231</sup> Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 31 n.32 (2003); accord Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1520.

<sup>232</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

<sup>233</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 939 (1973).

<sup>234</sup> *Id.* at 940-41.

On reflection, it is probably unsurprising that it took a change in constitutional culture—the revival of substantive due process—to bring *Lochner* to the fore as an anti-canonical metonym; after all what is argumentative metonymy without an argument? But once kindled, *Lochner*’s prominence within constitutional practice grew rapidly. The real “tipping point,” David Bernstein argues, came with the publication of Laurence Tribe’s *American Constitutional Law* in 1978.<sup>235</sup> Tribe—probably our most learned living doctrinalist—famously broke constitutional analysis down into seven “models,”<sup>236</sup> and hailed *Lochner* and its era as the high water mark of the second category: “the model of implied limitations on government.”<sup>237</sup> As Bernstein points out, throughout a twenty-eight page chapter Tribe “consistently us[ed] *Lochner* as shorthand for all of the Supreme Court’s liberty of contract jurisprudence,”<sup>238</sup> and the case name itself appears in four of the seven section titles.<sup>239</sup> But—unlike Gunther, Bork, and Ely before him—Tribe did not analogize the Warren Court to the *Lochner* Era; instead he worked to distinguish the modern substantive due process revival from its dishonored roots.<sup>240</sup> Indeed, he found no fault in the *Lochner* Court’s willingness to thwart the will of the majority—“surely there can be no general duty on the part of a deliberately countermajoritarian body like a court ... simply to follow the election returns”—arguing rather that the Court’s mistake was “overconfidence” in “its own factual notions,” and in failing to recognize “that the economic ‘freedom’ it was protecting was more myth than reality.”<sup>241</sup> As such, Tribe’s treatment was the first significant academic effort to recalibrate *Lochner*’s conventional metonymic meaning: by his account the epithet should not apply to *all* judicial interference with the legislative prerogative, only to economic activism or other “pigheaded” judicial encroachments.<sup>242</sup> It is here that we see the process of canonical refinement take center stage, as the older progressive *Lochner* metonym collided with new judicial culture of civil and social justice.

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<sup>235</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1518, 1520.

<sup>236</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1.1 at 1 (1st ed., 1978).

<sup>237</sup> *Id.* §§ 8.1-8.7.

<sup>238</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1520.

<sup>239</sup> TRIBE, *supra* note 234, at §§ 8.2, 8.5-7.

<sup>240</sup> *See id.* § 15.6, at 902 (declaring the “durability” of *Meyer* and *Pierce*, despite their *Lochner* Era heritage).

<sup>241</sup> *Id.* § 8.7, at 454.

<sup>242</sup> *Id.* § 8.7, at 455.



Bernstein contends that, after Tribe's treatise, use of the term "Lochner Era" in academic discourse "skyrocketed,"<sup>243</sup> and my own search of the electronic databases largely confirms his assessment.<sup>244</sup> But to attribute this circumstance too completely to Tribe's book is probably to underestimate the Court's own role in fueling *Lochner's* growing notoriety. In 1977—a year before Tribe—the Court itself used Gunther's "Lochner Era" terminology for the first time in *Moore v. City of East Cleveland*, which struck down an ordinance that defined a "family" narrowly for housing purposes.<sup>245</sup> And notably, Justice Lewis Powell's plurality opinion took very much the same view of *Lochner's* legacy as would Tribe:

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment.<sup>246</sup>

Rather, Powell urged continuing due process recognition for what the latter Justice John Marshall Harlan had called "the traditions from which [our nation] developed as well as the traditions from which it broke," and suggested that *Meyer* and *Pierce*—but not *Lochner*—met the relevant criteria.<sup>247</sup> So it seems that the Court, too, was working to refine *Lochner's* meaning in an effort to distinguish between good and bad "Lochnering." And, with this in mind, it was undoubtedly some combination of influence and interplay between the academy and the bench that brought the anti-canonical metonym into the modern constitutional era—but subsequent evolutions in *Lochner's* meaning would take place largely in the academy.<sup>248</sup>

In the twelve years following *Moore* just eighteen federal court opinions—and only one Supreme Court opinion—used the phrase "Lochner Era," and none gave the words any

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<sup>243</sup> Bernstein, *A Centennial Retrospective*, *supra* note 107, at 1521.

<sup>244</sup> A search of Hein-On-Line's "Most Cited Law Reviews" database for the phrase "Lochner Era" returns zero articles for the ten years preceding Gerald Gunther's 1970 edition; thirty-three articles between 1970 and 1978, when Tribe's treatise appeared; and 281 articles over the following ten years.

<sup>245</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) The ordinance forbid a woman from housing her son and his two sons by different mothers. *Id.* at 497.

<sup>246</sup> *Id.* at 502.

<sup>247</sup> *Id.* at 501 n.9 (quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).

<sup>248</sup> Again, though, it is probably too simplistic to leave the Court entirely out of this discussion. See, for example, Justice Sandra Day O'Connor's interesting discussion of *Lochner* and stare decisis in *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (1992).

thought or meaning beyond the conventional association with judicial overreach.<sup>249</sup> During the same period, however, discussion of *Lochner* exploded in the legal journals.<sup>250</sup> The debate stretched into the next decade, with conservatives continuing to cast the decision as the poisonous root of the resurgent substantive due process tree,<sup>251</sup> and liberals building upon Tribe's efforts to refine the metonym and defend the Warren Court.<sup>252</sup> On one side, Antonin Scalia continued to attack *Roe* by association, calling it "the most controversial recent extension" of Lochnerian jurisprudence,<sup>253</sup> while, on the other, John Hart Ely distinguished between *Lochner's* illegitimate exaltation of economic rights and the Warren Court's heroic efforts to protect the sort of Meiklejohnian democracy-promoting rights described in *Carolene Products'* fourth footnote.<sup>254</sup> Writing shortly after his failed nomination to the Supreme Court, an embittered Robert Bork continued to counsel the dangers of any unenumerated due process right—whether it be the liberty of contract or the right of privacy: "When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the competing claims."<sup>255</sup> Cass Sunstein, on the other hand, tried valiantly to recast *Lochner's* metonymic meaning in the mechanical jurisprudence tradition, as symbolic of the need for government neutrality and inaction within perceived "natural" constructs like the market.<sup>256</sup> Understood this way, Sunstein argued that *Lochner's* "heirs are not *Roe v. Wade* and *Miranda v. Arizona*, but instead such decisions as *Washington v. Davis* [and] *Buckley v. Valeo*."<sup>257</sup> Others, like Bruce Ackerman, challenged the very assumption that *Lochner* was wrongly decided, and argued that its modern infamy simply reflects the dramatic changes in constitutional meanings that have occurred since 1905.<sup>258</sup>

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<sup>249</sup> This figure is based on a Westlaw search of federal court opinions rendered between 1978 and 1990.

<sup>250</sup> See *supra* note 242.

<sup>251</sup> E.g., Antonin Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703 (1985); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* (1990).

<sup>252</sup> E.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980), FISS, *supra* note 103, at 390-93; ACKERMAN, *supra* note 103, at 99-103.

<sup>253</sup> Scalia, *supra* note 250, at 705.

<sup>254</sup> ELY, *supra* note 251, at 73-77.

<sup>255</sup> BORK, *supra* note 250, at 257.

<sup>256</sup> Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987). One might even plausibly include *Parents Involved v. Seattle*, 127 S. Ct. 2738 (2007) on a list meeting this criteria.

<sup>257</sup> *Id.* at 875.

<sup>258</sup> ACKERMAN, *supra* note 103, at 99-103.

Indeed, the literature on *Lochner*'s legacy grew so large that it began to inspire its own literature, to which this discussion is itself, I suppose, a belated addition.<sup>259</sup>

As evidence of this trend, the past decade has seen the publication of such recensionist titles as Gary Rowe's *Lochner Revisionism Revisited*;<sup>260</sup> David Bernstein's *Lochner's Legacy's Legacy* and *Lochner Era Revisionism, Revised*;<sup>261</sup> Jack Balkin's *Lochner and Constitutional Historicism*;<sup>262</sup> and Howard Gillman's *De-Lochnerizing Lochner*.<sup>263</sup> All of this, I suggest, is a compelling demonstration of our continuing efforts to distill constitutional meaning and reclaim constitutional high ground along the shifting riverbed of constitutional practice. While sometimes such efforts—such as those targeting Jefferson's wall of separation—aim simply to chip away at a hard spot in the bank with the hope of casting it back into the moving stream, at other times we endeavor to preserve the induration, but want to reshape it slightly so that it channels the constitutional water in a different direction. The debate surrounding *Lochner* belongs to the latter category, as the participants (for the most part) agree that *Lochnering* is a constitutional sin, but now fight over exactly what the sin entails. As a result, while *Lochner* itself was doctrinally repudiated in 1937 (if not before)—and vilified in nearly all other respects by 1975—in 2003 as esteemed a scholar as David Strauss could credibly ask why the case was wrongly decided.<sup>264</sup>

For all these reasons, I suggest that *Lochner* is an excellent example of an anti-canonical text employed as an argumentative metonym. It is a decision that—due in large part to a concise and powerful dissent—has taken on associated meanings beyond its literal text, and our constitutional practice has refined those meanings over time to align with the changing culture of constitutional progressivism. When the Court stood in the way of progressive change, *Lochnering* became a high crime—but later, as the Court took the lead in social reform, the elements of the crime required updating. Interestingly, *Lochner* also provides a compelling demonstration of the legal academy's impact on metonymic meanings

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<sup>259</sup> I am somehow reminded here of Hannah Arendt's ironical appraisal of Franz Kafka's legacy: "Though during his lifetime he could not make a decent living, he will now keep generations of intellectuals both gainfully employed and well-fed." FRANZ KAFKA, *THE TRIAL* xix (Breon Miller, trans., 1999).

<sup>260</sup> Gary Rowe, *Lochner Revisionism Revised*, 24 *LAW & SOC. INQ.* 221 (1999).

<sup>261</sup> David Bernstein, *Lochner's Legacy's Legacy*, 82 *TEX. L. REV.* 1 (2003); David Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *GEO. L. J.* 1 (2003).

<sup>262</sup> Jack Balkin, "Wrong The Day It Was Decided": *Lochner* and Constitutional Historicism, 85 *B.U. L. REV.* 677 (2005).

<sup>263</sup> Howard Gillman, *De-Lochnerizing Lochner*, 85 *B.U. L. REV.* 859 (2005).

<sup>264</sup> David Strauss, *Why Was Lochner Wrong?*, 70 *U. CHI. L. REV.* 373 (2003).

and the construction of the constitutional canon—even within the doctrinal modality. This is certainly not always, nor even usually, the case, as quite often it is the advocates and the courts that reshape and realign doctrinal metonyms. We need look no further than *Brown v. Board of Education*—perhaps the twentieth century’s most canonical piece of doctrine<sup>265</sup>—for a powerful illustration of such metonymic evolution accomplished at the bar. There we see a case that once symbolized our national commitment to overcome the worst traditions of cultural segregation and racist iniquity refined to represent the kind of “colorblindness” that could invalidate a school enrollment program intended to promote racial integration.<sup>266</sup> But *Lochner* is evidence that the academy—and, in truth, many spheres of constitutional discourse—can also have a profound impact on the constitutional canon and constitutional meanings. Indeed, the final section explores the evolution of metonymic associations within the most inclusive and proletarian of constitutional modalities: ethos.

### III. ETHOS: CONSTITUTIONAL POLITICS, THE DECLARATION OF INDEPENDENCE, THE GETTYSBURG ADDRESS, AND CANONICAL REFORMATION

In the early 1960s the Supreme Court struggled mightily with issues of legislative malapportionment, as a number of outmoded state districting schemes created significant disparities in electoral influence.<sup>267</sup> In a 1963 case arising out of Georgia, the Court held that the Constitution requires states to count rural and urban votes equally, and justified that position by reference to, among other texts, the Declaration of Independence and Abraham Lincoln’s dedication of a national cemetery at Gettysburg, Pennsylvania: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”<sup>268</sup> The following year, in *Reynolds v. Sims*—which remains among the most important and controversial cases decided last century—the Court gave pride of place to

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<sup>265</sup> See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1242 (1993) (“No one questions *Brown*’s result (anymore). Indeed, so completely has the legal system reoriented itself after the decision that it may not even be possible to find the legal material to mount a serious challenge to its conclusion.”).

<sup>266</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007).

<sup>267</sup> In 1964 in Vermont, for example, the smallest legislative district was made up of 36 people, while the largest consisted roughly 35,000. Thus, individuals in the smaller county enjoyed nearly a thousandfold representative advantage. Morris K. Udall, *Reapportionment I—“One Man, One Vote”... That’s All She Wrote*, CONGRESSMAN’S REPORT (Office of Senator Morris K. Udall), Oct. 14, 1964, at 3.

<sup>268</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

this same language as it carried forward a constitutional argument about the applied meaning of the Equal Protection Clause.<sup>269</sup> But, as every first year law student learns, neither the Declaration of Independence nor the Gettysburg Address have any binding legal force, so what can these texts possibly tell us about the legitimacy of a constitutional proposition? The answer is, in a word, *ethos*. These are canonical statements of the ethos of American constitutionalism and democracy, and their appearance is perfectly appropriate within the ethical modality of constitutional argument.<sup>270</sup> Even ethos, however, is susceptible to change and evolution, and this is true of the most canonical texts in the modality. This section examines the Declaration of Independence's metonymic odyssey through constitutional argument over the first century of American life. In particular, I explore the Declaration's canonical reformation in the political crucible of the Civil War, culminating in Lincoln's dramatic universalization of natural rights at Gettysburg. Again, however, I begin with a description of the Declaration's meaning in historical context.

As he lay dying in late June of 1826, Thomas Jefferson reluctantly declined an invitation from Washington to join in celebrating the fiftieth anniversary of American independence:

I should indeed, with peculiar delight, have met and exchanged there congratulations with the small band, the remnant of that host of worthies, who joined with us, on that day, in the bold and doubtful election we were to make, for our country, between submission and the sword; and to have enjoyed with them the consolatory fact that our fellow citizens, after half a century of experience and prosperity, continue to approve the choice we made. May it be to the world what I believe it will be, (to some parts sooner, to others later, but finally to all) the signal of arousing men to burst the chains, under which Monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government.<sup>271</sup>

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<sup>269</sup> Reynolds v. Sims, 377 U.S. 533, 558 (1964).

<sup>270</sup> Indeed, the Declaration of Independence had made an appearance in 169 Supreme Court opinions—including many of the most famous and controversial—through the 2009 term. (Count based on Appendix 9.1 to THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 303 (Scott Douglas Gerber ed., 2002) [hereinafter ORIGINS AND IMPACT] and a search of Westlaw's Supreme Court database for the years 2001-2009) For a thorough account of the ethical modality, see BOBBITT, FATE, *supra* note 9, at 93-119.

<sup>271</sup> Thomas Jefferson, Letter to Roger Weightman (June 24, 1826) in THOMAS JEFFERSON PAPERS, ser. 1, reel \_\_\_\_

Even in his last hours, then, Jefferson showed flashes of the “masterly Pen” that John Adams had a half-century before recommended to draft the Declaration of Independence.<sup>272</sup> And, in one of the great synchronicities of American mythology, both men—their lives inextricably entwined from the summer of 1776 onward—would die on the very day of the Declaration’s fiftieth anniversary. Here, at the end, it seems Jefferson hoped to reinforce what he saw as the Declaration’s enduring meaning; it had, he thought, “laid open to every view the palpable truth that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred.”<sup>273</sup> Yet even as he wrote, black slaves worked the halls and fields of Monticello—many remained in bondage after his death—and the institution of slavery stood as a stark counterfactual to American political idealism.

What, then, are we to make of the Declaration’s majestic opening lines, particularly the “self-evident” assertion that “all men are created equal ... endowed by their creator with certain unalienable rights”?<sup>274</sup> Did Jefferson, or the Continental Congress, really mean *all* men? The Declaration is, of course, more than just its soaring preamble, but it is this specific question—the metonymic meaning of Jefferson’s most famous phrase—that this section explores. The answer, of course, is complex and controverted, but I begin my account with Jefferson himself in the hope of understanding what the enigmatic Virginian understood his words to mean. I then look at the Congress that debated and issued the Declaration, before finally investigating the argumentative uses to which these words were put in the next eighty-seven years of constitutional and political discourse. I conclude that the phrase came to have two meanings: the first aspirational, and the second functional; and that it was only through the political calamity of war, made human in the person of Abraham Lincoln, that the two were finally fused.

In considering Jefferson’s personal intentions, it may be useful to begin by examining some of the sources from which he drew intellectual inspiration. Jefferson claimed that he “turned to neither book nor pamphlet” when composing his initial draft of the

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<sup>272</sup> DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, VOL. 3 335 (L.H. Butterfield, Leonard C. Faber & Wendell D. Garrett eds., 1962).

<sup>273</sup> Jefferson to Weightman, *supra* note 271. Here Jefferson undoubtedly paraphrased English Colonel Richard Rumbold’s famous last words from the scaffold. See Douglass Adair, *Rumbold’s Last Speech, 1685, and Jefferson’s Last Words on Democracy, 1826*, 9 WM. & MARY Q. 521, 525-26 (1952).

<sup>274</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Declaration<sup>275</sup>—indeed, Adams would later describe the opening sentiments as commonplace and “hackneyed in Congress for two years before”<sup>276</sup>—but we can certainly deduce some of the works that helped shape the preamble. Chief among these must be the first section of George Mason’s *Virginia Declaration of Rights*, which began by asserting that “all men are by nature equally free and independent and have certain independent rights.”<sup>277</sup> Mason’s work formed part of the Virginia Constitution of 1776, which Jefferson himself helped draft, and he regarded Mason as the “wisest man of his generation.”<sup>278</sup> Further, the *Pennsylvania Gazette* reprinted the Virginia Declaration in Philadelphia on June 12, 1776—right around the time Jefferson was writing.<sup>279</sup> Mason, in turn, undoubtedly drew on John Locke’s *Second Treatise of Civil Government*, in which the British philosopher claimed that “all men by nature are equal,” and that “equal right every man hath to his natural freedom.”<sup>280</sup> Indeed, Jefferson would later acknowledge his debt to “the elementary books of public right, [such] as Aristotle, Cicero, Locke, [and] Sidney” as well as to the “harmonizing sentiments of the day.”<sup>281</sup> The Philadelphia air, it seems, was thick with talk of natural law and equality.

The salient question here, of course, is whether Jefferson’s reliance on this spirit and these sources can tell us anything meaningful about his intention to include black slaves within the Declaration’s opening ambit. While it is true, and perhaps interesting, that Aristotle, Cicero, Mason, (and perhaps Locke and Sidney<sup>282</sup>) all lived in slave holding societies, this is hardly evidence of their views on the practice as a matter of political theory.

<sup>275</sup> Thomas Jefferson, Letter to James Madison (Aug. 30, 1823) in THOMAS JEFFERSON PAPERS ser. 1, reel \_\_\_\_.

<sup>276</sup> John Adams, Letter to Thomas Pickering (Aug. 6, 1822) reprinted in 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 512, 514 (Charles F. Adams ed., 1850).

<sup>277</sup> George Mason, *Virginia Declaration of Rights* (1776) reprinted in FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 52 (John J. Patrick ed., 1995). For a thorough account of Mason’s influence on Jefferson’s draft, see R. Carter Pittman, *The Declaration of Independence: Its Antecedents and Authors* (1953) available at: [http://rcarterpittman.org/essays/documents/Declaration\\_of\\_Independence.html](http://rcarterpittman.org/essays/documents/Declaration_of_Independence.html) (last visited April 29, 2009).

<sup>278</sup> KATE MASON ROWLAND, THE LIFE OF GEORGE MASON, 1725-1792 v. 1, ix (1892).

<sup>279</sup> “Williamsburg,” PENNSYLVANIA GAZETTE, 2, c.1 (June 12, 1776).

<sup>280</sup> JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, CHAP. VI, SEC. 54 (1690) reprinted in JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (J. W. Gough ed., 1946).

<sup>281</sup> Thomas Jefferson, Letter to Henry Lee, Jr. (May 8, 1825) in THOMAS JEFFERSON PAPERS, ser. 1, reel \_\_\_\_.

Robert Pittman disputes this claim, arguing that Jefferson relied heavily on William Henry Drayton’s preamble to the South Carolina Constitution of 1776 and a grand jury charge he issued as Chief Justice the same year. See Pittman, *supra* note 277.

<sup>282</sup> The feudal forms largely replaced outright slavery in England by the end of the thirteenth century, see CHARLES A. BAKER, THE COMPANION TO BRITISH HISTORY 1145 (2d ed., 2001), but during Sidney and Locke’s time some African slaves were brought to the island until the practice was essentially ended with Lord Mansfield’s opinion in *Somerset’s Case*, 98 Eng. Rep. 499 (K.B. 1772).

Mason, though he owned a large number of slaves, openly denounced the institution,<sup>283</sup> while Aristotle plainly believed some people were born to serve.<sup>284</sup> Locke thought contractual slavery was against the law of nature, but he believed that the practice might appropriately exist “between a lawful conqueror and his captive”<sup>285</sup> when slaves “taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters.”<sup>286</sup> Sidney had some contradictory things to say on the topic, but he did proclaim that there exists “no such thing in nature as a slave.”<sup>287</sup> Cicero, for his part, both owned slaves and thought of the institution in very Aristotelian terms: “[W]hen those are slaves who cannot govern themselves, there is no injury done.”<sup>288</sup> On balance, these considerations might suggest that Jefferson accepted slavery as a necessary exception to—or perhaps even an essential part of—natural law political theory. But Jefferson’s mere familiarity with philosophical justifications, of course, proves very little about his personal thoughts on the American institution and its place in the Declaration’s embodied political ideology. If anything, we might reasonably conclude that Jefferson’s own convictions were closest to Mason’s, for whom he had great affinity. Indeed, more compelling evidence suggests that slavery was very much on his mind in Philadelphia, and that he thought the slave trade, at least, anathema to the natural order.

Jefferson’s original draft of the Declaration included among its list of grievances against George III the charge that:

He has waged cruel War against human Nature itself, violating its most sacred Rights of Life and Liberty in the Persons of a distant People who never offended him, captivating and carrying them in Slavery to another Hemisphere, or to incur miserable Death in their Transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian king of Great Britain. Determined to keep open a market where Men should be bought and

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<sup>283</sup> See, e.g., George Mason, *Annotations to the Virginia Charters, No. 1621, Sec. III*, reprinted in *THE PAPERS OF GEORGE MASON* 173, n.7 (Robert A. Rutland ed., 1970) (“[Slavery is] that slow Poison, which is daily contaminating the Minds & Morals of our People. Every Gentlemen here is born a petty Tyrant.”).

<sup>284</sup> See ARISTOTLE, *POLITICS*, CHAP. V, SEC. 20 in 9 *GREAT BOOKS OF THE WESTERN WORLD* 447 (Ben Jewett, trans., Robert Hutchins ed., 1952) (“For that some should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth some are marked out for subjection, others for rule.”).

<sup>285</sup> LOCKE, *supra* note 279, at 14 (Chap. IV, Sec. 24). Locke thought it impossible to contract away one’s life and liberty, which belonged naturally to God. See *id.*

<sup>286</sup> *Id.* at 42 (Chap. 7, Sec. 85).

<sup>287</sup> ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* SEC. IV (1698) (Thomas West ed., 1996).

<sup>288</sup> CICERO, *DE REPUBLICA*, BK. III, CHAP. XXV quoted in A.J. Raymer, *Slavery—The Graeco-Roman Defense*, 10 *GREECE AND ROME* 17, 19 (1940). The quoted language is derived from fragmentary sources; for a more thorough treatment of Cicero’s thoughts on the issue, see MARCUS TULLIUS CICERO, *ON THE COMMONWEALTH AND ON THE LAWS*, BK. III, CHAP. 37A (James Zetzel, ed., 1999).



sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain his execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he has also obtruded them: thus paying off former crimes committed against the Liberties of one people, with crimes he urges them to commit against the lives of another.<sup>289</sup>

This language, later struck in Congress, is certainly consistent with Jefferson's more general thoughts on slavery as an institution. In his *Notes on the State of Virginia*, written just a few years later, Jefferson lamented the destructive effects on both master and subject of "a perpetual exercise of the ... most unrelenting despotism on the one part, and degrading submissions on the other."<sup>290</sup> And, as a matter of political theory, he clearly thought the practice a violation of natural law: "[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?"<sup>291</sup> From this evidence, then, it would seem Jefferson did not share the Aristotelian view of a natural condition of slavery.

Yet there is other language in the *Notes* that has led some historians to argue that Jefferson did not view black men as nearly the equal of whites.<sup>292</sup> In a long passage exploring a proposal to abolish slavery in Virginia and recolonize blacks elsewhere, he discussed the relative merits of the races, and, in general, seemed to find blacks inferior.<sup>293</sup> In particular, he thought little of the black intellect: "[I]n reason [blacks are] much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and ... in imagination they are dull, tasteless and anomalous."<sup>294</sup> He attributed some of these shortcomings to the oppressions of slavery, but overall he concluded that "their inferiority is not the effect merely of their condition of life."<sup>295</sup> But his judgments were not entirely

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<sup>289</sup> Taken from Thomas Jefferson, *Notes on the Proceedings in Congress June 7 – August 1, 1776*, in THOMAS JEFFERSON PAPERS, ser. 1, reel \_\_\_\_.

<sup>290</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 174 (J.W. Randolph, ed. 1853).

<sup>291</sup> *Id.*

<sup>292</sup> See, e.g., PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 191 (2d ed., 2001) (arguing that Jefferson's views on race "are quite clear, and utterly in conflict with the 'liberal Jefferson' that his biographers have tried to create"); LEONARD LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963).

<sup>293</sup> JEFFERSON, NOTES, *supra* note 289, at 148-56.

<sup>294</sup> *Id.* at 150-51.

<sup>295</sup> *Id.* at 152.

disparaging, and in particular he believed that “in [endowments] of the heart [Nature] will be found to have done them justice.”<sup>296</sup> While this may seem a hollow concession to the modern reader, Garry Wills insightfully argues that, given Jefferson’s grounding in Scottish common-sense philosophy, we should understand his reference to the “heart” as real praise for blacks’ ability to feel and act upon the moral sentiments: “[W]hen Jefferson says that blacks are equal to whites in ‘benevolence, gratitude, and unshaken fidelity,’ he is listing the cardinal virtues of moral-sense theory, the central manifestations of man’s highest faculty.”<sup>297</sup> Thus, Wills contends that Jefferson actually judged the races literally equal in the most deeply significant way: “For him, accidental differences of body and mind were dwarfed by an all-important equality in the governing faculty of man.”<sup>298</sup> And it was this faculty above all others that gave blacks an equal claim, in Jefferson’s mind, to the natural rights of mankind.

On balance, then, I think it is safe to conclude that Jefferson did intend to include blacks within the scope of the Declaration’s sweeping statement of equality. Both his polemic against the King’s support of the slave trade and his broader disapprobation for the American practice suggest that he saw no place for the institution in a just political theory. Even his explicit assertions of racial inferiority—no matter how jarring they may be to modern ears—hardly demonstrate that Jefferson believed blacks had a lesser claim to equality at law. Rather, he thought that equal possession of the moral senses gave blacks every right to equal standing in the political community. And certainly he was not alone in these beliefs among the Declaration’s signers—John Adams and James Wilson spring instantly to mind<sup>299</sup>—but, just as certainly, he knew that not all members of the Continental Congress shared his views. Indeed, it is in turning our attention to the Congress that issued the Declaration that we can begin to make out the preamble’s divergent aspirational and functional meanings.

As instructive as the original condemnation of the slave trade is in assessing Jefferson’s intentions when drafting the Declaration, the decision to omit the impassioned language from the final document reveals even more about Congress’s understanding of the

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<sup>296</sup> *Id.* at 154.

<sup>297</sup> GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 225-26 (1978).

<sup>298</sup> *Id.* at 228.

<sup>299</sup> See, e.g., John Adams, Letter to George Churchman (Jan. 24, 1801) in 9 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 91 (Charles F. Adams ed., 1854); James Wilson, *Address to the Pennsylvania Ratifying Convention* (Dec. 3, 1787) reprinted in 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787* 451-53 (John Elliot ed., 1888).

lofty exordium. Unfortunately, there is little primary record of the debates in Congress over the Declaration's final language, though a comparison of Jefferson's original draft (or at least the copy he gave to John Adams beforehand) and the ratified version shows a number of significant alterations.<sup>300</sup> While it is clear that some of these occurred within the drafting committee—which consisted of Jefferson, Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston—the grievance against the slave trade was removed in Congress.<sup>301</sup> The best contemporary descriptions of the Congressional debates are Jefferson's own *Notes on the Proceedings in Congress*, which he seems to have taken during the summer of 1776, and then sent in refined form to James Madison in 1783.<sup>302</sup> Of the passage on slavery, he wrote the following:

The clause, too, reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it. Our Northern brethren also I believe felt a little tender under those censures; for though their people have very few slaves themselves yet they had been pretty considerable carriers of them to others.<sup>303</sup>

In truth, it was excruciating for Jefferson to see any of his language altered, but this particular omission was among those he most regretted.<sup>304</sup> Indeed, Virginian Richard Henry Lee tried to soothe Jefferson by expressing his wish “for the honor of Congress, as for that of the States, that the manuscript had not been mangled as it is.”<sup>305</sup> But Jefferson well understood the political realities of the colonial alliance, and the deletion of the passage on slavery cannot have come as any great surprise; for, as he trenchantly observed in explaining his *Notes*, “the sentiments of men are known not only by what they receive, but what they reject also.”<sup>306</sup>

As the bulk of Jefferson's account makes clear, Congress's principal motivation for issuing the Declaration was the hope that formal independence might make French financial

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<sup>300</sup> For a full discussion of the numerous drafts and the timing and impetus of various changes, see Gerard W. Gawalt, *Drafting the Declaration*, in *ORIGINS AND IMPACT*, *supra* note 270, at 1, 4-7.

<sup>301</sup> *Id.* at 10.

<sup>302</sup> *Id.* at 5.

<sup>303</sup> Jefferson, *Notes on the Proceedings*, *supra* note 288.

<sup>304</sup> JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 51 (1997). Pauline Meier argues that Jefferson had intended the slavery passage “to be the emotional climax of his case against the King.” PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 120 (1997).

<sup>305</sup> Richard Henry Lee, Letter to Thomas Jefferson (July 21, 1776) in *THOMAS JEFFERSON PAPERS*, ser. 1, reel

<sup>306</sup> *Gawalt, Drafting the Declaration*, *supra* note 300, at 10.

and military support possible. Fully a third of the objections Jefferson ascribes to Robert Livingston, Edward Rutledge and the Pennsylvania delegation address the perceived inefficacy of the Declaration as an enticement of foreign aid.<sup>307</sup> A representative criticism suggested that “foreign powers would either refuse to join themselves to our fortunes, or having us so much in their power as that desperate declaration would place us, they would insist on terms proportionally more hard and prejudicial.”<sup>308</sup> Conversely, John Adams and the Virginia delegation argued that “a declaration of Independence alone could render it consistent with European delicacy for European powers to treat with us, or even to receive an Ambassador from us”—and, indeed, the “only misfortune is that we did not enter into an alliance with France six months sooner.”<sup>309</sup> With such pressing foreign policy concerns at hand, it is understandable that Congress thought it an inopportune time to contemplate or debate the natural law implications of black slavery. For Congress, the Declaration was meant to serve a pragmatic and very political function, and it did that well. As Pauline Maier has observed, “By exercising their intelligence [and] political good sense ... the delegates managed to make the Declaration more accurate and more consonant with the convictions of their constituents.”<sup>310</sup> And certainly not all of those constituents shared Jefferson’s aspirations for the legal equality of African slaves.<sup>311</sup> Thus, I think it is ultimately safe to ascribe to Congress a *functional* understanding of the preamble’s language: while some delegates certainly aspired to universal human equality, the assembly as a whole was content at that time to stake its claim only to the equal rights of Englishmen.<sup>312</sup>

Returning to my descriptivist project, I think the *use* of the Declaration’s preamble as an argumentative metonym over the next seventy-five years of constitutional discourse provides ample evidence of its different functional and aspirational meanings. In the early years of the Union, the Declaration had not yet achieved the canonical status that was to

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<sup>307</sup> Jefferson, *Notes on the Proceedings*, *supra* note 288.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> MAIER, *SCRIPTURE*, *supra* note 304, at 150.

<sup>311</sup> John Adams later conceded, “I knew [Jefferson’s] Southern brethren would never suffer [the slavery passage] to pass in Congress.” Adams to Pickering, *supra* note 276 at 514.

<sup>312</sup> See Philip F. Detweiler, *Congressional Debate On Slavery and the Declaration of Independence, 1819-1821* 63 AM. HIST. REV. 598, 600 (1958) (“[The historian] who would contend that the phrase “all men” was understood by the members of the Continental Congress to include Negro slaves has a fragile foundation on which to build.”).

come,<sup>313</sup> but it did make sporadic appearances in Congressional debates on slavery—primarily to buttress aspirational kinds of arguments. In 1789, Virginian Josiah Parker invoked “the pure beneficence of the doctrine we hold out to the world on our Declaration of Independence” in a failed push for a tax on slave importations.<sup>314</sup> The following year, New Jersey’s Elias Boudinot rose in support of a Quaker remonstrance against slavery—which, too, failed to garner much support—quoting the language of Jefferson’s preamble.<sup>315</sup> And sixteen years later, as efforts got underway to prohibit the slave trade at the first constitutional opportunity, Pennsylvanian John Smilie appealed to “the principles of 1776, which have indeed been since laughed at, but which are now beginning, I hope, to be held in universal estimation”; and then read aloud Jefferson’s list of self-evident truths.<sup>316</sup> Interestingly, however, it was in response to Smilie that fellow Pennsylvanian Joseph Clay began explicitly to trace the outlines of the functionalist metonym:

The Declaration of Independence is to be taken with a great qualification. It declares those men have an inalienable right to life; yet we hang criminals—to liberty, yet we imprison—to the pursuit of happiness, yet he must not infringe on the rights of others. If the Declaration of Independence is taken in its fullest extent, it will warrant robbery and murder, for some may think even those crimes necessary to their happiness.<sup>317</sup>

Clay, of course, rather missed Smilie’s point—which decried slavery as a hereditary *status*—but the general thrust of his argument for a “qualifi[ed]” understanding of the preamble would take center stage in 1819, as slavery dominated the debate over Missouri’s admission to the Union.

The controversy began in February of 1819, when New York Representative James Tallmadge moved to amend a pending bill on Missouri’s admission “to limit the existence of slavery in the new State, by declaring all free who should be born in the Territory after its

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<sup>313</sup> Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. 557, 564 (1962).

<sup>314</sup> 1 ANNALS OF CONG. 337 (1789) (Joseph Gales ed., 1834). For a general discussion of these arguments—which was an invaluable resource in writing this section—see Detweiler, *Congressional Debate*, *supra* note 312 at 600-01.

<sup>315</sup> 2 ANNALS OF CONG. 1469 (1790).

<sup>316</sup> 5 ANNALS OF CONG. 226 (1806).

<sup>317</sup> *Id.* at 227.

admission into the Union.”<sup>318</sup> The constitutional question Tallmadge’s amendment posed—whether Congress had the power to condition admission upon a restriction of slavery—admitted no ready textual, historical, or doctrinal answer, and so several delegates turned to ethical argument and invoked the Declaration as “an authority admitted in all parts of the Union [as] a definition of the basis of republican government.”<sup>319</sup> With this in mind Massachusetts’ Timothy Fuller suggested that, by the light of the preamble, a slaveholding Missouri could not satisfy the Constitution’s Republican Government Clause, as “it cannot be denied that slaves are men, it follows that they are in a purely republican government born free, and are entitled to liberty and the pursuit of happiness.”<sup>320</sup> Several Southern delegates immediately objected that such an interpretation would call into question “the republican character of [any of] the slaveholding States,”<sup>321</sup> and Fuller’s response clearly delineates the Declaration’s functional and aspirational meanings in constitutional law:

The predominant principle ... is that all men are free and have an equal right to liberty, and to all other privileges; or, in other words, the predominant principle is republicanism, in its largest sense. But, then, the same compact contains certain exceptions. The States then holding slaves are permitted, from the necessity of the case, and for the sake of union, to exclude republican principles so far, and only so far, as to retain their slaves in servitude, and also their progeny, as had been the usage, until they should think it proper or safe to conform to the pure principle by abolishing slavery.<sup>322</sup>

Congress adjourned in March, and when it reconvened the following December the proslavery faction had had time to develop and build upon these functionalist arguments.<sup>323</sup>

Maryland Senator William Pinkney, for example, expressed the view that, “The self-evident truths announced in the Declaration of Independence are not truths at all, if taken literally.”<sup>324</sup> Though the reporter’s notes do not record Pinkney’s speech, New Hampshire Senator David Moril summarized his view in opposing it: “[W]hat does the gentlemen say? ‘That all men are created equal’ is absurd, because one is born poor, one to inherit a fortune—

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<sup>318</sup> 33 ANNALS OF CONG. 1166 (1819). For a comprehensive account of the Missouri controversy, see GLOVER MOORE, *THE MISSOURI CONTROVERSY, 1819-1821* (1953); accord Detweiler, *Congressional Debate*, *supra* note 312, at 602-16.

<sup>319</sup> 33 ANNALS OF CONG. 1181 (1819); accord Detweiler, *Congressional Debate*, *supra* note 312, at 603.

<sup>320</sup> 33 ANNALS OF CONG. 1180 (1819).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 1182.

<sup>323</sup> Detweiler, *Congressional Debates*, *supra* note 312, at 604.

<sup>324</sup> *Id.* at 606.

one a peasant, another a prince—one a slave, another a freeman.”<sup>325</sup> And Pennsylvania Senator Jonathan Roberts attributed to Pinkney the view “that the self-evident truths set forth in the Declaration of Independence are not, as we understand them, the foundation of all our principles of law, but merely abstract aphorisms, which have but limited meaning.”<sup>326</sup> This functionalist sentiment met with stiff opposition from anti-slavery advocates—with Senator Moril rejoining, “I presume the equality intended does not consist in the fortune [men] may enjoy, or the rank they may hold in society, but in the inalienable right with which every one is indued”<sup>327</sup>—but the proslavery voices persisted. Indeed, Virginian Representative Andrew Smyth took the attack on the aspirational Declaration a step further by arguing that the document actually militated *against* any limitations on slavery:

[The Continental Congress] asserted that man cannot alienate his liberty, nor by compact deprive his posterity of liberty. Slaves are not held as having alienated their liberty by compact. They are held under the law and usage of nations, from the remotest times of which we have any historical knowledge, and by the municipal laws of the States, over which the Congress of 1776, and this Congress have not, any control. We *agree* with the Congress of 1776, that men, on entering into society, cannot alienate their right to liberty and property, and that they cannot, by compact, bind their posterity. And, therefore, we contend that the people of Missouri cannot alienate their rights, or bind their posterity by a compact with Congress.<sup>328</sup>

Here, then, is an extreme version of the functionalist Declaration—one which rejects the aspirational reading entirely—accomplished in two parts: first, the equality language does not refer to slaves, who have been outside of society since time immemorial; and, second, natural law prevents one generation from imposing any restrictions on the next’s right to hold property. Read this way—and many proslavery delegates were happy to accept the invitation—Jefferson’s preamble actually protected Missouri whites by ensuring them an equal “right to alter, to amend, [or] to abolish their constitution[.]”<sup>329</sup>

In the end the more modest functionalist Declaration won out, as evidenced in the Missouri Compromise. The arrangement admitted Missouri without a restriction on slavery,

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<sup>325</sup> 35 ANNALS OF CONG. 296 (1820).

<sup>326</sup> *Id.* at 341.

<sup>327</sup> *Id.* at 296.

<sup>328</sup> *Id.* at 1005 (emphasis added).

<sup>329</sup> *Id.* at 1384. John Tyler (Va.), Louis McClane (De.), and Richard Johnson (Ky.) were among those who pressed Smyth’s argument further. *See*, Detweiler, *supra* note 312, at 609-10.

brought in Maine as a free state, and prohibited the expansion of slavery into the remaining portion of the Louisiana Purchase north of Missouri's southern border.<sup>330</sup> As such, the Compromise reflected Northern aspirations for the gradual elimination of slavery, but, as a political matter, conceded the functional need for a delicate balance of slave and free states. As then-Representative John Tyler explained in cautioning against the too-literal application of natural law aspirations, "Liberty and equality are captivating sounds; but they often captivate to destroy."<sup>331</sup> And, as the *St. Louis Enquirer* sagely observed of life in Missouri after the Compromise,

Our declaration of rights tells us "all men are born equal," that is, are entitled to equal rights . . . . This truth entitles every slave to his freedom, and that without delay—but will those who have these words continually within [their] mouths be willing to go so far? No, necessity, policy, expediency, etc. forbid.<sup>332</sup>

The extreme functionalist account—which saw the Declaration protecting slaveholder's rights—lived on in proslavery thought, and eventually made a significant reappearance in the Supreme Court.<sup>333</sup> But over most of the next three decades some version of the moderate functional interpretation held sway, as Congress engaged in increasingly Ptolemaic gyrations to preserve the Union. By no means, however, did the aspirational reading disappear altogether. Indeed, it remained alive and vibrant in the rhetoric and politics of other social movements.

Over that time, a number of activist groups wrote their own, alternative versions of the Declaration of Independence, many adapting Jefferson's preamble expressly to include their own communities.<sup>334</sup> In 1829, George Henry Evans authored the first such effort—*The Working Men's Declaration of Independence*—on behalf of the New York Working Man's

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<sup>330</sup> GEORGE B. TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 409-10 (4th ed., 1996).

<sup>331</sup> 35 ANNALS OF CONG. 1384 (1820).

<sup>332</sup> *Theory and Practice*, ST. LOUIS INQUIRER p. 3, c. 1 (Feb. 10, 1821).

<sup>333</sup> William Jenkins has treated this argument as a version of a contextual equality claim, whereby men were equal with others within their own "community": white landholders with other white landholders; white laborers with other white laborers; slaves with slaves; and so on. He attributes this argument in later years to Jefferson Davis, Senator Albert Gallatin Brown of Mississippi, and Senator (later General) Thomas Read Rootes Cobb of Georgia. WILLIAM S. JENKINS, *PROSLAVERY THOUGHT IN THE OLD SOUTH* 191-94 (1935). A version of this extreme account of the Declaration would reappear in *Dred Scott v. Sandford*. See *infra* notes 352-53 and accompanying text.

<sup>334</sup> See WE, *THE OTHER PEOPLE: ALTERNATIVE DECLARATIONS OF INDEPENDENCE BY LABOR GROUPS, FARMERS, WOMEN'S RIGHTS ADVOCATES, SOCIALISTS, AND BLACKS, 1829-1975* (Philip S. Foner ed., 1976) (collecting documents).



Party.<sup>335</sup> Published in the *Working Man's Advocate*, Evans's Declaration began, "'When in the course of human events, it becomes necessary' for one class of a community to assert their natural and unalienable rights in opposition to other classes of their fellow men," and then proceeded to intersperse quotations from Jefferson with his own, class-oriented language.<sup>336</sup> A similar appeal to the aspirational Declaration emerged five years later from an association of trade unions in Boston.<sup>337</sup> The *Declaration of Rights of the Trades' Union of Boston and Vicinity* announced that, "With the Fathers of our Country, we hold that all men are created free and equal" and condemned all "laws which have a tendency to raise any peculiar class above their fellow citizens."<sup>338</sup> In 1844, farm and homestead advocate Lewis Masquerier drew up a *Declaration of Independence of the Producing from the Non-Producing Class*, which held "these truths to be self-evident: That as the natural wants and powers of production of all men are nearly equal, all should be producers as well as consumers."<sup>339</sup> And perhaps the best-known alternative Declaration came out of the Women's Rights Convention in Seneca Falls, New York in July of 1848.<sup>340</sup> Elizabeth Cady Stanton's *Declaration of Sentiments and Resolutions* galvanized the emerging women's movement with a list of grievances against patriarchy, and with her famous addition to Jefferson's original language: "We hold these truths to be self-evident: that *all men and women* are created equal."<sup>341</sup>

These adoptions and adaptations reveal just how alive the aspirational Declaration remained in the American mind, but they also demonstrate that the prevailing functional account left many marginalized groups feeling excluded from the ideal. And this exclusion remained most obvious and controversial in the case of black slaves. Indeed, by the 1850s the political tension over slavery had grown so extreme that even the qualified Declaration could no longer serve much functional purpose. In January of 1854, Illinois Senator Stephen Douglas proposed a bill aimed at making Chicago the eastern terminus of future railroad extension into the western territories.<sup>342</sup> To carry his bill—part of which organized the

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<sup>335</sup> *Id.* at 47.

<sup>336</sup> *Equal Rights—No. II*, WORKING MAN'S ADVOCATE p.2, c.2 (Dec. 5, 1829).

<sup>337</sup> WE, THE OTHER PEOPLE, *supra* note 334, at 51.

<sup>338</sup> *Declaration of Rights of the Trades' Union of Boston and Vicinity*, THE MAN p.1, c.2 (June 12, 1834).

<sup>339</sup> *Declaration of Independence of the Producing from the Non-Producing Class*, reprinted in WE, THE OTHER PEOPLE, *supra* note 334, at 64, 66.

<sup>340</sup> WE, THE OTHER PEOPLE, *supra* note 334, at 77.

<sup>341</sup> *Declaration of Sentiments and Resolutions*, reprinted in WE, THE OTHER PEOPLE, *supra* note 334, at 78 (emphasis added).

<sup>342</sup> TINDALL & SHI, *supra* note 330, at 663.

unsettled portions of the Louisiana Purchase into the Kansas and Nebraska territories—Douglas needed the support of southern congressmen, and as a result he made a series of fateful concessions to slave interests.<sup>343</sup> The final version of the Kansas-Nebraska Act, as it came to be known, eviscerated the Missouri Compromise by eliminating the prohibition on slavery in the Louisiana territories, and aroused such intense sectional animosity that it seemed to set the nation on an inevitable road to civil war.<sup>344</sup> And it was in this fractured and volatile political context that Chief Justice Roger Taney set out to destroy the aspirational Declaration of Independence once and for all with his opinion in *Dred Scott v. Sandford*.<sup>345</sup>

Dred Scott, a slave owned by Dr. John Emerson and his family, sued for his freedom in Missouri state court based on his travels with Emerson to free soil in both Illinois and the Wisconsin Territory.<sup>346</sup> Scott won his freedom from a Missouri jury, but lost it again on appeal to the Missouri Supreme Court.<sup>347</sup> He then filed suit in the Federal Circuit Court in St. Louis, and ultimately took his appeal to the United States Supreme Court.<sup>348</sup> The threshold issue in federal court—whether Scott was a constitutional “citizen” for diversity jurisdiction purposes—put the scope of the Declaration’s preamble squarely in question; and Taney answered in no uncertain terms.<sup>349</sup> He began by referencing a “fixed and universal” history that regarded blacks as “beings of an inferior order” who were “altogether unfit to associate with the white race, either in social or political relations.”<sup>350</sup> In Taney’s reckoning, it was traditionally thought that blacks were “so far inferior, that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.”<sup>351</sup> He then explicitly reconciled this historical interpretation with the Declaration of Independence in a passage that is worth quoting at length:

The general words quoted above [“all men are created equal”] would seem to embrace the whole human family, and if they were used in a

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<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 663-70. Sectional hostilities boiled over on the ground as “popular sovereignty” gave way to violence in “Bleeding Kansas.” Likewise, mobs in Boston rioted against continued enforcement of the Fugitive Slave Act, and violence even invaded the Senate when South Carolinian Preston Brooks severely beat Massachusetts’ Charles Sumner as he sat at his desk. *Id.*

<sup>345</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>346</sup> *Id.* at 396-97.

<sup>347</sup> *Id.* at 398.

<sup>348</sup> *Id.* at 398-99. In the federal appeal, Emerson’s widow turned matters over to her brother, John Sanford of New York.

<sup>349</sup> *Id.* at 403.

<sup>350</sup> *Id.* at 407.

<sup>351</sup> *Id.*

similar instrument today they would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; .... Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery.<sup>352</sup>

Taney thus denied that the Declaration had ever had any aspirational meaning at all, and imputed this same understanding to the Constitutional Convention. He easily concluded, therefore, that Scott “was not a citizen of Missouri within the meaning of the Constitution of the United States.”<sup>353</sup>

This conclusion did not, as one might expect, draw a close to the opinion. Rather, Taney—perhaps under pressure from new President James Buchanan<sup>354</sup>—went on to address the merits of Scott’s claim and, by extension, the federal government’s power to restrict slavery in the territories.<sup>355</sup> Taney creatively interpreted Congress’s Article IV authority to “make all needful rules and regulations respecting the territory or other property belonging to

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<sup>352</sup> *Id.* at 410.

<sup>353</sup> *Id.* at 427. It is certainly worth noting that dissenting Justices Benjamin Curtis and John McLean did not buy Taney’s anti-aspirational account: “Our independence was a great epoch in the history of freedom; and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.” *Id.* at 537 (Curtis, J., dissenting).

<sup>354</sup> Donald Fehrenbacher and others have argued that President-Elect Buchanan had a number of communications with Justices John Catron and Robert Grier—and also Taney—about the outcome of the pending case. DONALD FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 308-14 (1978); accord PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* 43-47 (1997). Relying on these communications, Buchanan felt comfortable asserting in his inaugural speech that the Supreme Court would soon issue a decision on the question of slavery in the territories. James Buchanan, *First Inaugural Address* (March 4, 1857) reprinted in 7 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 2962-63 (James D. Richardson ed., 1897).

<sup>355</sup> *Dred Scott*, 60 U.S. at 431-33.

the United States”<sup>356</sup> as extending only to those territories that belonged to the United States at the time of ratification,<sup>357</sup> and, finding no other power over slavery in the text, concluded that Congress lacked legislative authority to restrict the practice.<sup>358</sup> This conclusion voided the Missouri Compromise’s prohibition on slavery—already largely repealed by statute—as a matter of constitutional law, and Taney (and Buchanan) hoped it would finally put an end to the intensifying calls for federalized abolition. They could not have been more wrong, of course, as the decision only provoked greater outrage and indignation among anti-slavery advocates. In particular, Taney’s determined effort to bury the aspirational Declaration of Independence drew inspired criticism from an up and coming Senatorial candidate in Illinois. Indeed, Abraham Lincoln would make the Declaration’s universal promise one of the focal points of his campaign against incumbent Senator Stephen Douglas.<sup>359</sup>

Speaking against the *Dred Scott* decision in Springfield, Illinois in the spring of 1857, Lincoln challenged Taney’s (and Douglas’s) contention that the Declaration served no nobler purpose than to effect a formal separation from Britain—that, in essence, it had no aspirational meaning.<sup>360</sup> Lincoln saw the preamble very differently, and offered his own account of the Continental Congress’s intentions:

They did not mean to assert the obvious untruth, that all men were then enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They simply meant to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for a free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that “all men are created equal” was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving

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<sup>356</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>357</sup> *Dred Scott*, 60 U.S. at 432.

<sup>358</sup> *Id.* at 451-52.

<sup>359</sup> See, generally, Henry V. Jaffa, *Abraham Lincoln and the Universal Meaning of the Declaration of Independence*, in ORIGINS AND IMPACT, *supra* note 270, at 29 (reviewing Lincoln’s take on the Declaration in his debates with Douglas).

<sup>360</sup> Abraham Lincoln, *Speech at Springfield, Illinois* (June 26, 1857) reprinted in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 405-06 (Roy P. Basler ed., 1953).

itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism.<sup>361</sup>

He went on to ridicule Douglas's recent public claim that the Declaration spoke only of "British subjects on this continent being equal to British subjects born and residing in Great Britain."<sup>362</sup> Lincoln held up Douglas's speech and invited the crowd to "read that carefully over some leisure hour, and ponder well upon it—see what a mere wreck—a mangled ruin—it makes of our once glorious Declaration."<sup>363</sup> And from these beginnings, the competing accounts of the Declaration would feature prominently in the vigorous and storied campaign debates of the following year.

In nearly all of their seven debates, from Ottawa in August to Alton in October, Douglas repeated the same charge—often in the same words—against Lincoln: "[He] reads from the Declaration of Independence that all men were created equal, and then asks how can you deprive a negro of that equality which God and the Declaration of Independence award to him?"<sup>364</sup> To Douglas, Lincoln and "all of the little Abolition orators" were simply wrong, and the appropriate interpretation was barbarically clear:

For one, I am opposed to negro citizenship in any and every form. I believe this government was made on the white basis. I believe it was made by white men, for the benefit of white men and their posterity forever, and I am in favor of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians, and other inferior races.<sup>365</sup>

Lincoln was, in truth, initially measured and politic in his responses. In northern Illinois, at places like Freeport and Ottawa, he felt comfortable saying "there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence,"<sup>366</sup> while in more southern cities like Jonesboro and Charleston he conceded that "while [the races] remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white

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<sup>361</sup> *Id.* at 406.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> Stephen Douglas, *First Joint Debate in Ottawa* (Aug. 21, 1858) reprinted in 3 THE COMPLETE WORKS OF ABRAHAM LINCOLN 217 (John G. Nicolay & John Hay eds., 1894).

<sup>365</sup> *Id.*

<sup>366</sup> Abraham Lincoln, *First Joint Debate in Ottawa* (Aug. 15, 1858) reprinted in 3 WORKS OF LINCOLN, *supra* note 364, at 229-30.

race.”<sup>367</sup> But, as the debates neared their conclusion in Galesburg and Alton, Douglas’s attacks grew more intense, and in response Lincoln began to return to the aspirational principles he had defended a year earlier in Springfield.

At Galesburg on October 7, Douglas made his most impassioned case yet against the aspirational Declaration:

I tell you that this Chicago doctrine of Lincoln’s—declaring that the negro and the white man are made equal by the Declaration of Independence and by Divine Providence—is a monstrous heresy. The signers of the Declaration of Independence never dreamed of the negro when they were writing that document. . . . Now, do you believe—are you willing to have it said—that every man who signed the Declaration of Independence declared the negro his equal, and then was hypocrite enough to hold him as a slave, in violation of what he believed to be the divine law?<sup>368</sup>

In response that day, Lincoln asserted that “the entire records of the world . . . may be searched in vain for one single affirmation, from one single man, that the negro was not included in the Declaration of Independence”;<sup>369</sup> a claim he fleshed out in more detail—and with more confidence and venom—the following week at Alton:

At Galesburg the other day, I said, in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term “all men.” I reassert it today. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a matter of great astonishment to me if they shall be able to find that one human being three years ago had ever uttered the astounding sentiment that the term “all men” in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, denied the truth of it. . . . But I say, with a perfect knowledge of all this hawking at the Declaration without directly attacking it, that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it and then asserting it did not include the negro. I believe the first man who ever

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<sup>367</sup> Abraham Lincoln, *Fourth Joint Debate in Charleston* (Sept. 18, 1858) reprinted in 4 WORKS OF LINCOLN, *supra* note 364, at 90.

<sup>368</sup> Stephen Douglas, *Sixth Joint Debate in Galesburg* (Oct. 7, 1858) reprinted in 4 WORKS OF LINCOLN, *supra* note 364, at 254-55.

<sup>369</sup> Abraham Lincoln, *Sixth Joint Debate in Galesburg* (Oct. 7, 1858) reprinted in 4 WORKS OF LINCOLN, *supra* note 364, at 263.

said it was Chief Justice Taney in the Dred Scott case, and the next to him was our friend, Stephen A. Douglas. And now it has become the catchword of the entire party.<sup>370</sup>

This, then, is the Lincoln that emerged from the debates with Stephen Douglas: the man whom, though unsuccessful in his Senate bid, would assume the Presidency just two years later, as the nation teetered on the edge of civil war. And this—the consolidation and universalization of the aspirational Declaration of Independence—was among the core convictions of purpose that he carried with him into that office.

Without rehearsing the well-known vagaries of the early Civil War, it is sufficient to say that, by the summer of 1863, Lincoln actively sought an opportunity to ground the numbing human sacrifices of battle in a profound—indeed, a sacred<sup>371</sup>—statement of constitutional purpose. In September of 1862, after the Battle of Antietam, he had issued a preliminary proclamation threatening to free the slaves in those rebellious states that did not desist by year's end,<sup>372</sup> and specific enforcement had followed on January 1, 1863.<sup>373</sup> But these were essentially military and political documents, aimed at swaying British sentiment in favor of the Union cause,<sup>374</sup> and not the kind of ethical statement required for the canonical reformation that Lincoln desired. That summer, however, the cataclysmic bloodletting at Gettysburg, Pennsylvania—culminating in Confederate Major General George Pickett's ill-fated charge up Cemetery Ridge—would provide Lincoln the opportunity to reaffirm on hallowed ground the aspirational meaning of Jefferson's Declaration of Independence.

Left to clean up the grisly aftermath of three days of horrific battle,<sup>375</sup> Pennsylvania Governor Andrew Curtin charged Gettysburg banker David Wills with the task of giving

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<sup>370</sup> Abraham Lincoln, *Seventh Joint Debate at Alton* (Oct. 15, 1858) reprinted in 5 WORKS OF LINCOLN, *supra* note 364, at 35-38.

<sup>371</sup> For a fascinating account of the central role of sacrifice and the sacred in politics and political communities, see PAUL KAHN ...; see also Ronald A. Garet, "The Last Full Measure of Devotion": *Sacrifice and Textual Authority*, 28 CARD. L. REV. 277 (2006).

<sup>372</sup> Abraham Lincoln, *Preliminary Emancipation Proclamation* (Sept. 22, 1862) reprinted in 5 COLLECTED WORKS, *supra* note 360, at 434.

<sup>373</sup> Abraham Lincoln, *Emancipation Proclamation* (January 1, 1863) reprinted in 6 COLLECTED WORKS, *supra* note 360, at 28.

<sup>374</sup> See generally, Christopher Ewan, *The Emancipation Proclamation and British Public Opinion*, 67 THE HISTORIAN 1 (2005) (recounting shift in British public opinion based on issue of slavery).

<sup>375</sup> For a particularly vivid account of the aftermath, see GABOR BORITT, *THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS* 1-23 (2006).

proper burial to the thousands of abandoned bodies.<sup>376</sup> Wills formed an interstate fundraising commission, took bids on reburial costs, ordered caskets from the War Department, and hired landscape architect William Saunders to design a National Cemetery on seventeen acres of new public land.<sup>377</sup> In September, he invited former Harvard President, Senator, and Secretary of State Edward Everett to deliver an oration in November dedicating the site; and two months later he asked President Lincoln also to give “a few appropriate remarks” on the occasion.<sup>378</sup> Lincoln took the invitation very seriously, and, leaving his nearly hysterical wife in Washington with a sick child (and one recently buried), made his way into a crowded Gettysburg on November 18; a day before the ceremony.<sup>379</sup> That evening he offered some brief comments to a small crowd gathered at his door:

I appear before you, fellow citizens, merely to thank you for this compliment. The inference is a very fair one that you would hear me for a little while at least, were I to commence to make a speech. I do not appear before you for the purpose of doing so, and for several substantial reasons. The most substantial of these is that I have no speech to make. [Laughter.] In my position it is somewhat important that I should not say foolish things [A Voice: If you can help it!] It very often happens that the only way to help it is to say nothing at all. [Laughter.] Believing that is my present condition this evening, I must beg of you to excuse me from addressing you further.<sup>380</sup>

Lincoln—never fond of extemporaneous speaking in his capacity as President—was profoundly conscious of the significance his words could have at that time and place, and thus he wanted to spend time polishing his remarks for the next day.<sup>381</sup>

There is perhaps more myth and heroic narrative surrounding Lincoln’s preparation of the Gettysburg Address than there is of any other canonical text. Years later Mary Shipman Andrews would make famous the story of a haggard President scribbling with a broken pencil

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<sup>376</sup> GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 21 (1992). Wills had earlier written to Curtin describing the gruesome scene: “In many instances arms and legs and sometimes heads protrude [above ground] and my attention has been directed to several places where the hogs were actually rooting out bodies and devouring them.” *Id.* (Garry) Wills estimates that 8,000 bodies were left above or barely below ground; of these roughly 3,300 Confederate bodies were eventually shipped south. *Id.* at 20, n.4.

<sup>377</sup> *Id.* at 22.

<sup>378</sup> DAVID HERBERT DONALD, *LINCOLN* 460 (1995).

<sup>379</sup> WILLS, *LINCOLN*, *supra* note 376, at 26.

<sup>380</sup> Abraham Lincoln, *Remarks to Citizens of Gettysburg* (Nov. 18, 1863) *reprinted in* 7 *COLLECTED WORKS*, *supra* note 360, at 16-17.

<sup>381</sup> WILLS, *LINCOLN*, *supra* note 376, at 31.



on a scrap of wrapping paper aboard the train to Pennsylvania.<sup>382</sup> Other accounts insist that he wrote it on the back of an envelope at Wills house, or, better yet, composed it on the spot as he listened to Everett's oration.<sup>383</sup> The truth is difficult to nail down, but various surviving drafts indicate that he had at least written a version of the speech before leaving Washington,<sup>384</sup> and in all likelihood Lincoln constructed and polished the text as carefully and precisely as was his usual custom.<sup>385</sup> But, whatever the case, after Everett's long and learned oration, the President rose and, in his high-pitched Kentucky drawl, delivered the brief address that, as George Anastaplo has said, "remains the most distinctive distillation of Lincoln's 'political religion'".<sup>386</sup>

Four score and seven years ago our fathers brought forth upon this continent a new Nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that Nation or any Nation so conceived and so dedicated can long endure.

We are met on a great battlefield of that war. We are met to dedicate a portion of it as the final resting place of those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But in a larger sense we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men living and dead who struggled here have consecrated it far above our power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us, the living, rather to be dedicated here to the unfinished work that they have thus far so nobly carried on. It is rather for us to be here dedicated to the great task remaining before us, that from these honored dead we take increased devotion to that cause for which they here gave their last full measure of devotion; that we here highly resolve that the dead shall not have died in vain; that the nation shall, under God, have a new birth of freedom; and that Government of the people, by the people, and for the people, shall not perish from the earth.<sup>387</sup>

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<sup>382</sup> MARY RAYMOND SHIPMAN ANDREWS, A PERFECT TRIBUTE 5-7 (1906).

<sup>383</sup> WILLS, LINCOLN, *supra* note 376, at 27.

<sup>384</sup> It seems that Lincoln penned a first draft on White House stationery, which suggests he wrote it while still at home. Succeeding drafts show various degrees of revision and polish. See 7 COLLECTED WORKS, *supra* note 360, at 17 n.2. For a beautiful reproduction of the White House draft, see WILLIAM E. BARTON, LINCOLN AT GETTYSBURG 73 (1930).

<sup>385</sup> See DONALD, *supra* note 378, at 460-61.

<sup>386</sup> GEORGE ANASTAPLO, ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY 231 (1999).

<sup>387</sup> Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg* (Nov. 19, 1863) [Newspaper Version] reprinted in 7 COLLECTED WORKS, *supra* note 360, at 19-21.

In just his first two sentences, Lincoln codified and immortalized the aspirational Declaration of Independence, and, perhaps more importantly, made it the *ideological stakes* of the Civil War: the winner's Declaration prevails. It was, after all, eighty-seven years after the signing of that document—not the ratification of the Constitution—that he took the stage in Gettysburg and recommitted us to Jefferson's ideal; and it was this "Nation so conceived" that was on trial by fire.

There is some debate about the address's immediate reception,<sup>388</sup> and it is evident that not every listener found it compelling.<sup>389</sup> But Edward Everett, for one, told Lincoln that his brief remarks had likely surpassed his own two-hour oration,<sup>390</sup> and there is now no serious doubt that Lincoln was mistaken when he claimed "[t]he world will little note nor long remember what we say here."<sup>391</sup> Indeed, contrary to the President's noble sentiment, one could credibly argue that more Americans today are familiar with the Gettysburg Address than know of Pickett's Charge, Little Round Top, or the Peach Orchard. As one historian has put it, "Many of us who know [the Address by heart] could not tell where Gettysburg is nor when the battle was fought."<sup>392</sup> This is because it is the speech, and not the battle, that symbolizes the canonical reformation of the Declaration of Independence. It is the Gettysburg Address as an ethical metonym—fused in war with Jefferson's preamble—that recanonized the aspirational Declaration and recommitted us to universal human equality. This is not to say, of course, that the aspiration was then, is now, or ever will be realized. But it is to say that it *is* the American aspiration; there is no longer any recourse to the functional Declaration, and the aspirational metonym has set up very firmly indeed in the constitutional riverbed. And it is thanks to this process of canonical reformation—this "new birth of freedom"—that we know exactly where the Supreme Court is pointing us when it invokes

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<sup>388</sup> BARTON, LINCOLN AT GETTYSBURG, *supra* note 382, at 89-93.

<sup>389</sup> The Democratic press, in general, was outraged that Lincoln had looked to the Declaration, rather than the Constitution, for guidance on the nation's founding dedication, *see, e.g.*, DONALD, *supra* note 376, at 465, while the *Harrisburg Patriot and Union* opted to "pass over the silly remarks of the President; for the credit of the nation we are willing that a veil of oblivion shall be dropped over them," and the *London Times* opined "[a]nything more dull and commonplace it wouldn't be easy to produce." BARTON, LINCOLN AT GETTYSBURG, *supra* note 382, at 115-16.

<sup>390</sup> Edward Everett, Letter to Abraham Lincoln (Nov. 20, 1863) in ABRAHAM LINCOLN PAPERS AT THE LIBRARY OF CONGRESS, Manuscript Division (Washington, D.C.: American Memory Project, 2000-02) *available at* <http://memory.loc.gov/ammem/alhtml/alhome.html> (last visited May 20, 2009) ("I should be glad, if I could flatter myself that I came as near to the central idea of the occasion, in two hours, as you did in two minutes.").

<sup>391</sup> *Gettysburg Address*, *supra* note 385, at 20.

<sup>392</sup> Willard L. King, *Lincoln at Gettysburg*, 50 AM. B. ASSOC. J. 1033 (1964).

“[t]he conception of political equality from the Declaration of Independence to Lincoln’s Gettysburg Address.”<sup>393</sup>

## CONCLUSION

I hope the preceding examples successfully illustrate three distinct kinds of canonical evolution in constitutional argument—*decanonization*, *canonical refinement*, and *canonical reformation*—which may roughly correspond to the familiar doctrinal practices of repudiating, distinguishing, and extending common law precedent. I further hope that I have demonstrated that this evolution is internal to the forms of argument themselves, as practiced within the existing spheres of constitutional discourse, and that is not the result of some external change in circumstances either in the world or in the texts. Finally and most importantly, I hope that my descriptive efforts offer practitioners some insight into the types of argument that can produce changes in canonical and constitutional meaning over the long term. And I would be gratified if, along the way, I shed perhaps a little new light on—or at least refreshed the memory of—old and familiar constitutional narratives. With all that said, however, I want to devote my concluding paragraphs to reviewing the (perhaps esoteric) theory underlying my efforts, and to discussing the implications and value of understanding canonical texts as argumentative metonyms.

One of Wittgenstein’s fundamental purposes in the *Philosophical Investigations* was to reject the search for a single unified (or unitary) account of language’s internal logic, which had occupied the bulk of his only other published work: the *Tractatus Logico-Philosophicus*.<sup>394</sup> Rather, the later Wittgenstein suggested that language is not one activity, but a variety of different kinds of activities, each with different rules and purposes.<sup>395</sup> Across the spectrum of these myriad “language-games,” the same word often serves a variety of different—though related—functions, each specific to the particular “game” within which it is

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<sup>393</sup> *Gray*, 372 U.S. at 381.

<sup>394</sup> See WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 12, at 11-12 (#23). Here Wittgenstein introduces the concept of a varied “multiplicity of language-games” as an objection to “what logicians have said about the structure of language. (Including the author of the *Tractatus Logico-Philosophicus*.)” See also LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 3-4 (D.F. Pears & B.F. McGuinness, trans., 1974) (outlining the aim of his “picture-theory” of language). For very a helpful introduction to these ideas, see A.C. GRAYLING, *WITTGENSTEIN: A VERY SHORT INTRODUCTION* 81-89 (1996); ROBERT J. FOGELIN, *WITTGENSTEIN* 107-130 (2d ed., 1987).

<sup>395</sup> WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 12, at 11-12, 13, 31 (#23, #27, #65).

employed.<sup>396</sup> From this it follows that a word's meaning is not derived from some foundational referent in the world, but rather is determined by the use to which it is *properly* put within a particular language-game.<sup>397</sup> The "properly" part is critical, for it precludes the impossible suggestion that a word can mean whatever we want to use it to mean, and instead grounds the generalized claim that "the meaning of a word is its use" in a more specific account of what it is to understand and follow the rules of a language-game.<sup>398</sup> Without getting too deeply into Wittgenstein's complex and controverted theory of how we identify, understand, and follow these rules, it is essential to remember that obeying a rule is also a social practice and "[h]ence it is not possible to obey a rule privately."<sup>399</sup> We can only know that we have successfully followed a rule—that we know how to use a word and thus *what it means*—when our usage is successfully understood, or "ratified", by another participant in the particular language-game.<sup>400</sup> But, as elements of a practice, the rules themselves will evolve as contexts and purposes change, and as individual participants leave their impact on the game. It is in something like this way that meanings change over time.<sup>401</sup>

Philip Bobbitt has thoughtfully applied some of these insights about the nature of language to another contextualized social practice: constitutional law. He has suggested that we should understand the Constitution itself as analogous to a Wittgensteinian language-game—complete with its own internal rules or grammar—and that we must ground assertions of constitutional meaning (if they are to be legitimate) in the proper forms of argument and usage. I have tried here to give some account of how we interact with particular kinds of terms—canonical texts—in building these arguments, and of how these terms' meaning can change over time as we engage in the practices of constitutional law. This account builds on some of Wittgenstein's last thoughts about the nature of certainty, empiricism, and foundationalism, and uses his analogy of the river and its bed to explore the relationship between the constitutional canon and constitutional practice. My contention is that, while a

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<sup>396</sup> *Id.* at 31-35 (#65-#71). Wittgenstein famously likened this "relation" to a "family resemblance." *Id.* at 32 (#67).

<sup>397</sup> *Id.* at 20 (#43).

<sup>398</sup> *Id.* at 20, 79-81 (#43, #195-#202); accord GRAYLING, *supra* note 394, at 86.

<sup>399</sup> *Id.* at 81 (#202).

<sup>400</sup> For a discussion of "ratification" in this context, see PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* 36-39 (1958).

<sup>401</sup> I concede that these last two sentences are probably an extrapolation of Wittgenstein's comments; though I think it is justified. For some related thoughts, see FOGELIN, *supra* note 394, at 121-22; Bartrum, *Metaphors and Modalities*, *supra* note 7, at 188-89.

competent constitutional practitioner must remain within the canonical riverbed when constructing modal arguments, she may in turn—through perhaps subtle alterations in usage—reshape the constitutional geology over time. Importantly, this is not to suggest (in some crude realist sense) that a canonical text means whatever an advocate or judge uses it to mean at any particular place and time. We still must follow the rules, and our usages must be understood and ratified within the relevant community, for us to make any legitimate assertion of constitutional meaning. The claim is rather that, as creative individual actors within a much larger creative practice, we can impact and grow the rules of the language-game over time, thus changing the ways that canonical texts are appropriately used and understood.

One might still wonder, at this point, why it is helpful to understand canonical texts as *metonyms* for larger sets of associated concepts and principles. I suggest that thinking of the canon this way allows us to place these texts within the class of argumentative terms that derive their meaning primarily from usage, when we might otherwise see them as among the smaller group of terms whose meaning is fixed by “rigid designation,”<sup>402</sup> or, perhaps more loosely, what Wittgenstein calls “ostensive definition.”<sup>403</sup> That is, without the concept of metonyms, it might seem perfectly appropriate to understand canonical texts as the argumentative analog of proper names: the reference is to a particular text in the world, and the meaning of the text—once established—remains ever the same. When, however, we understand that the invocation of a canonical text does not point us to the text itself, but rather to a larger set of associated principles, it becomes easy to see how the text’s argumentative meaning derives from its correct use in discourse. Further, it becomes plausible to suggest that—as a metonym—a text’s meaning is more susceptible to those evolutions in context, purpose, and application that alter our practices of rule following over time. One could credibly argue, I think, that Wittgenstein’s contention that a word bears only a “family resemblance” to itself across a multiplicity of language-games already renders many words somewhat metonymic in nature,<sup>404</sup> and the relation of word to meaning is made only more

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<sup>402</sup> For an account of rigid designators—or terms that identify the same referent in all possible worlds—see SAUL A. KRIPKE, *NAMING AND NECESSITY* 6-15 (1980).

<sup>403</sup> WITTGENSTEIN, *supra* note 12, at 13 (#28).

<sup>404</sup> For an interesting description of “family resemblance” reference in terms of word clusters (something quite analogous to metonyms), see Sean Wilson, *The Fallacy of Originalism: What Philosophy of Language and Law*

abstract when—on top of this—a practitioner deliberately uses a term metonymically. It is all of this play in the joints, I suggest, that makes the meaning of canonical texts particularly amenable to subtle and creative argumentation over time.<sup>405</sup> And it is this possibility, this opening for individual impact over time, which I hope makes the idea of argumentative metonyms attractive to constitutional practitioners.

Henri Bergson famously, and perhaps enigmatically, claimed that “[a]ction on the move creates its own route; creates to a very great extent the conditions under which is it to be fulfilled, and thus baffles all calculation.”<sup>406</sup> While I might not go quite so far as Bergson, his thought does capture something essential about the nature of constitutional argument in general, and canonical metonyms in particular. Part of the reason that normative interpretive theories fail—or are at least inadequate—is that there is something like a quantum effect at work in constitutional practice: the arguments themselves often alter the meaning of their constitutive parts. Certainly, a successful argument can bring about a decision that seems to settle a particular question of disputed meanings; but even this stability exists for only a discrete contextual moment before questions of new application arise. Moreover, and this is the critical point here, creative new arguments then employ these “settled” terms and texts in subtle new ways that slightly alter the rules of the game, and in the process change their meanings again over time. Indeed, even an argument in support of a particular normative interpretive theory necessarily exerts some evolutionary influence on the very norms to which it appeals. This is the inevitable uncertainty captured in Wittgenstein’s river of empiricism, and it is the ultimate reason that constitutional law remains less like a science and more like an art—that is, something to be described, but not explained.

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*Says About 'Original Meanings'* 14-15, Working Paper available at: <http://ssrn.com/abstract=1405451> (last visited May 25, 2009).

<sup>405</sup> Again, I should make clear that one cannot simply create new canonical meanings out of whole cloth. Rather the practice is something like poetry, wherein the poet must use words in ways that are at least familiar enough that a reader can understand or ratify them. But, to succeed, the poet must also push the boundaries of rule following. See Bartrum, *supra* note 7, at 188-89 (discussing similar idea in the context of metaphors).

<sup>406</sup> HENRI BERGSON, *THE TWO SOURCES OF MORALITY AND RELIGION* 255-56 (Ruth A. Audra, Cloudesley Brereton, William H. Carter, trans., 1935).